

The Inter-Institutional Construction of Judgment

by

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Abstract

How do governing institutions contribute to the construction of good judgment? In this dissertation, I begin answering this question by developing a concept of judgment as a dynamic, collective process. I then apply this concept to the analysis of two U.S. institutions, direct legislation and the judiciary. One implication of this dissertation is that mass democratic politics and good judgment are not inherently antagonistic; rather, I argue, the capacity of any one institution to generate good judgment depends on its relation to other institutions. To assess institutional capacity, I develop a distinct standard of judgment, what I call good judgment. I develop this concept of good judgment by theorizing justification on both the individual and collective level. I define good judgment as the individual and collective adjustment of commitments over time in light of one another, privileging no one commitment, or set of commitments. I also argue good judgment requires attending to the consequences of commitments: good judgment reflexively integrates evidence generated by individual and collective experience. I give contextual specificity to this standard of good judgment through my case studies of direct legislation and the judiciary.

Chapter 1

Introduction

How does the structure of governing institutions contribute to the quality of judgments these institutions produce? To answer this question, I argue we need a dynamic concept of judgment, where judgment is construed as a collective process occurring over time. In this dissertation, I develop this dynamic concept, and I apply it to the analysis of two American institutions, direct legislation and the judiciary. I conclude that the capacity of any one institution to generate good judgment depends on its location within a larger system of institutions. This dissertation suggests how some of the burden for good judgment might be shifted from individual cognitive capacities to institutional design. In doing so, it contributes to debates over the relation between mass democratic politics and judgment, and the value of direct legislation and the judiciary.

I begin developing this dynamic concept of judgment by appealing to the idea of a reflective equilibrium. Reflective equilibrium is a theory of justification with origins in the philosophy of science, later appropriated by moral and political philosophy. It describes the process of justification as the adjustment of value commitments in a reflexive process over time, privileging no one commitment or set of commitments, with the aim of achieving coherence among commitments. It is helpful for two reasons. One, it offers a non-foundationalist account of justification because it does not prioritize among

commitments or sets of commitments. Two, it is scalable: it is an account of justification at both the individual and collective levels, so it helps us think through the relation between processes of individual judgment and collective judgment.

However, reflective equilibrium, at least in its appropriation by moral philosophy, is not an unproblematic concept. In its emphasis on coherence, reflective equilibrium can be read as urging convergence on a unitary value system. Reflective equilibrium can also be criticized for its abstract, philosophical character: while it helps us understand intellectual processes, it seems to have little to say about action, particularly political action. And as philosophers of science helpfully remind us, justification is also enhanced when commitments are tested in the world. So, I develop a concept of good judgment using both reflective equilibrium as well as criticisms of moral philosophy's appropriation. Unlike reflective equilibrium, the standard of good judgment I develop is not driven by the aim of convergence.

I define good judgment as the individual and collective adjustment of commitments over time in light of one another, privileging no one commitment, or set of commitments. I also argue good judgment requires attending to the consequences of commitments: good judgment reflexively integrates evidence generated by individual and collective experience. For example, I argue that the judiciary's particular capacity for learning the consequences of legislation, and for incorporating that knowledge into revised or new law, contributes to the quality of judgment produced by the system of institutions to which it belongs. Because of this emphasis on experience, good judgment is not a wholly intellectual exercise. Good judgment is often enhanced by political action. For example, we can understand judgment to be enhanced when individuals adversely

affected by legislation bring suit. This political action enables the court to exercise an epistemic function, as it allows the court to learn the consequences of law.

I give contextual specificity to this standard of good judgment through two case studies of U.S. institutions: direct legislation and the judiciary. I choose direct legislation because it is an ideal example to evaluate the claim that mass democracy is antagonistic to good judgment. The emphasis on face-to-face deliberation has also made direct legislation – which offers no formal, simultaneous deliberative forum – an understudied site of judgment. I choose the judiciary for similar reasons. The judiciary is an ideal example to break with assumption that insulation from mass politics enhances judgment: some might understand the judiciary’s contributions to depend precisely on its supposed insulation from mass democratic politics. Also, many democratic theorists (although not those who are also legal scholars) understand the judiciary to largely follow law, not politics, and to operate independently of other governing institutions; consequently, the judiciary is understudied, as it is not viewed as a site for the construction of collective judgment.

Examining these judiciary and direct legislation through the lens of judgment construction also offers new ways of understanding these institutions’ authority. Contrary to a popular assumption, direct legislation is not an entirely impoverished site for judgment. I show, for example, how it is not direct legislation itself, but direct legislation’s interactions with electoral campaigns that hinders good judgment. Direct legislation’s difficulties with judgment are due to its (contingent) relation to other institutions, not because it is an institution of unmediated mass democracy.

It is similar with the judiciary: viewing the judiciary through the lens of judgment construction offers an alternative understanding of the institution's authority. Rather than evaluating the judiciary in terms of adherence to law passed by elected officials, or in rights it does or does not protect – both functions which may depend on the court's insulation from mass democratic politics – we can understand the judiciary as contributing to a reflexive process of collective judgment among and between governing institutions. The judiciary's epistemic contributions are a function of both its place in interbranch and mass politics, as well as to the particular character of adjudicatory processes. For example, because adjudication requires actual controversies, the judiciary is particularly suited to uncovering undesired and unanticipated consequences of law, and because other institutions respond to (or anticipate) judicial decisions, those undesired and unanticipated consequences can be integrated into a collective process of judgment.

As these examples suggest, my concept of good judgment is not defined in reference to any particular set of substantive outcomes. It is a procedural standard, based on a particular idea of justification. The idea of a reflective equilibrium was an attempt to describe and theorize contemporary understandings of what justification means; in appealing to reflective equilibrium, as well as criticisms of it, I intend to do the same. So, of course, the standard of good judgment I develop is grounded in a particular view of justification, and so a particular set of norms. Much of the normative appeal of a theory of justification like reflective equilibrium (and, likewise, the standard of good judgment I derive from it) lies in the respect it gives to individuals as moral agents: justification occurs not by appeal to existing norms, or to a higher authority, but by asking individuals to reflect on their own commitments and those of others, and to participate in the

negotiation of the competing and often conflicting demands of moral pluralism. In this way, implicit in the standard of good judgment I develop are norms consistent with liberal democracy.¹

In this introduction, I explain how this dissertation contributes to debates over the evaluation of mass democratic politics and citizen competence, as well as the authority of direct legislation and the judiciary.

Mass democratic politics, citizen competence, and judgment

The belief that mass democratic politics is in tension with, if not outright antagonistic to, good judgment has a long history in Western political thought. This tension (or antagonism) has been parsed a number of different ways. For example, there is a tradition of understanding good judgment as a function of expertise. In Plato's "The Apology," for instance, we see Socrates comparing the knowledge of the expert horse breeder with that of the lay majority; we can read this comparison as part of Socrates' rebuke of Athenian democracy (25b). Or, consider Habermas's critique of the "scientization of politics" (1970). Drawing on Weber's analysis of rationalization, Habermas warns of a future in which the masses' reliance upon, and trust of, the judgment of scientific experts devolves into rule by technocrats (1970, 68). Rather than rejecting the judgment of mass democratic politics, as Socrates arguably does, Habermas's analysis is directed at the integration of scientific judgment and public judgment. The tradition of understanding judgment as a function of expertise is itself

¹ For a review of the relation between justification and contemporary liberal theory, see Chambers (2010).

diverse, and it is but one tradition in a larger history that understands mass democratic politics to be in tension with good judgment.

My entry into this sizeable debate is directed, in part, by recent questions over the evaluation of democratic representation. Contemporary mass democratic politics is, arguably, the politics of democratic representation. But in light of growing concerns over representation's constitutive character, there has been a rethinking among some theorists of how to understand its democratic authority. This rethinking has helped instigate a turn to judgment, specifically, the study of judgment's circulation between and among institutions. My approach to mass democratic politics is informed by this turn to examine the inter-institutional construction of judgment, as well as concerns over representation's constitutive character.

These concerns over representation's constitutive character are directed at the criteria long-used to evaluate contemporary democratic institutions: congruence between the people's preferences and policy outcomes. To the degree that governance results in median-reverting policy outcomes, this "congruence standard" believes democracy to be achieved. The concept of democracy underlying this standard is one of authorization: the people authorize representatives to govern in their interests. Several assumptions are at work in this concept of democracy: the assumption that people have interests that are prior to (or exogenous to) their political relationships with their representatives; the assumption that these interests are stable and coherent – in order to evaluate whether representatives are acting in the people's interests, those interests must somehow be identifiable; and the assumption that the entity of "the people" is stable, coherent, and exists prior to the process of representation.

However, some normative and empirical scholars are arguing that processes of preference formation and political identity constitution are circular, and not unidirectional, as the authorization concept (and the congruence standard) assumes. As more scholars consider how the process of political representation might construct the preferences it aims to represent, the ideal of “responsiveness to constituency preferences” is being increasingly questioned. Instead of seeing interests as existing prior to politics, many are now arguing that political processes also shape how people understand their interests.

The assumption that people’s interest are exogenous to political processes has been challenged by work in a variety of fields of study, including survey design, political psychology, public opinion, Congress, historical institutionalism, and normative political theory. Survey researchers have developed a subtle and sophisticated understanding of how interviews, questionnaires, and measures shape respondents’ answers and scholars’ interpretation of preferences (e.g., Converse and Schuman, 1974; Bouchard, 1976; Coverse and Presser, 1986; Rosenstone, Hansen, and Kinder, 1986; Mondak, 2001). Studies in political communication show how “frames” construct political viewpoints (e.g., Druckman, 2001, 2004). Political psychologists conceive preferences as endogenous to politics (e.g., Bartels, 2003). Some legislative scholars model representation as a dynamic, also with endogenous preferences (e.g., Gerber and Jackson, 1993; Stimson, Mackuen, and Erikson, 1995). Historical institutionalists examine how institutions create preferences (e.g. Thelen, 2003; Orren and Skowronek, 2004.). Political scientists have begun modeling dynamic models of representation that assume preferences are endogenous to the process of representation (e.g., Gerber and Jackson,

1993;), and many have replaced preferences with the more complex, multidimensional concept of attitudes (on attitudes, see e.g., Bartels, 2003; Druckman, 2001, 2004).

Feminist theorists have long suggested that the construct of “women” is created by the political process of representing “women.” For example, Young (2000) conceived of representation as a process which created a “perspective,” as opposed to the earlier, static model, which assumed the prior existence of a group such as women (with scare quotes intentionally absent). We can also see this idea of the constitutive character of political processes in the post-structuralist tradition, with its operating assumption that meaning and coherence only exist insofar that they are created through linguistic and social practices over time. That which is represented becomes a contingent “hegemonic articulation” (LaClau and Mouffe, 1985); a field of struggle (LaClau, 1996); an “empty place” (Lefort, 1988); or, say, in an appeal to aesthetic theory, an always insufficient, incomplete “perspective” (Ankersmit, 1996, 2002). These theorists share an agonistic view of politics, where any unity created through representation is only *apparent* unity, forged through struggles over power; on this view, democracy is, essentially, the constant political recreation of this (false, temporary) unity of “the people.”

Facing this dynamic, multi-directional character of political processes – what Disch has called the “constructivist” turn (2011, 102-3) – a number of theorists have argued for the “decentering” of democracy or “indirect” democracy (Habermas, 1996, 296-307). Democracy, this argument, goes should not be reduced to particular moments in formal governing institutions. Democracy is not “one big meeting at the conclusion of which decisions are made,” but involves formal and informal exchanges over a range of places and times, where “there is no final moment of decision” (Young, 2000, 45). It is

“a circular march that starts from outside the government, reaches political institutions, ends temporarily with the vote of the representatives, and returns to society, from where it starts its path all over again since the citizens have the right to propose abrogative referenda or new laws,” writes Urbinati (describing the model of democracy in Condorcet’s proposed constitution, 2006, 202).

For some, an implication of this decentering has been a shift in emphasis from the authorizing, decisionistic will to the circulation and formation of judgment (Disch, 2011; Rosanvallon, 2011; Urbinati, 2006). Judgment seems particularly suited to a notion of legitimacy that emphasizes intersubjective communication and informal (as well as formal) exchanges, and deemphasizes the moment of decision. Furthermore, judgment seems particularly suited to the contemporary context, where governing decisions are largely made by representatives.

One way to approach the relation between judgment and legitimacy is by conceiving judgment as form of citizen agency. Judgment can be construed as a form of spectatorship that gives citizens power, and thus confers democratic authority (Garsten, 2006, 7; Green, 2009; Urbinati, 2006, 5). For example, Urbinati argues that the political judgment of citizens involves the exercise of two types of powers: “*positive* as activating and propositive, and *negative* as receptive and surveilling” (2006, 5). In Urbinati’s judgment-based formulation of democratic representation, the citizen is a constant presence in government (2006, e.g., 95-7). She contrasts this model of democratic representation with those that truncates citizens’ participation to the decision of selecting the officials who will “actually” govern (my quotes, 2006, e.g., 95-7). We can read Urbinati as arguing that the autonomy of the representative invites the constant presence

of citizens through a supervisory process that involves citizens' application of their own political judgment. Judgment can thus be seen as an important form of citizens' "active doing" (Urbinati, 2006, 5, 3). However, the "constructivist turn" in democratic theorizing makes this approach to judgment hard to operationalize: if political processes are multidirectional, how would we recognize when a citizen is exercising power through his or her "own" political judgment?

An alternative way to interpret the turn to judgment is through the lens of the "constructivist turn." On this reading, judgment is not, centrally, about the individual exercise of agency; instead, judgment is construed as a dynamic, multi-directional, collective process in which inter-institutional relationships figure. Consider, for example, the constitution of Condorcet, used as a model for a judgment-based politics theorized by Urbinati (2006), as well as by Disch (2011) and Rosanvallon (2011). These theorists have cited Condorcet's proposed constitution as an example of how a system of institutions can contribute to the collective processes of judgment. For example, his proposed system included such features such as the circulation of proposed legislation among dispersed citizen assemblies. It is inter-institutional features such as these – as opposed to, say, an individual's ability to differentiate between good and bad representation – on which the construction of judgment rests. On this reading, then, the decentering of democracy has prompted not only a turn to judgment, but a depersonalization of judgment.

In the second chapter of this dissertation, I discuss Condorcet's proposed constitution as a model for analyzing how inter-institutional relations contribute to collective processes of judgment. However, I depart from previous interpretations by reading his proposal for the design of governing institutions in conjunction with his

proposal for a national system of public education (he developed these proposals at the same time). We might read his proposal for public education as consistent with the turn to institutions, as the public is educated via a system of public institutions. It is not, however, consistent with the depersonalization of judgment. His system of public education was meant to instill in citizens a capacity for critical reasoning and positive principals. I read his proposal as intending to give individual citizens the ability to judge governance that was in their own interest, and that which was not. In other words, his desire to establish a system of education demonstrates a concern with instilling a capacity for judgment at the level of the individual.

Read in light of the constructivist turn, Condorcet's proposal for education thus points to the limits of the design of governing institutions. The study of inter-institutional relations offers traction on the question of what the processes of judgment are, but it is not clear that it can answer the question of who the agents of those processes are. And without an answer to this question of agency, I doubt that the circulation of judgment can confer a specifically democratic authority, insofar that we understand democratic authority to refer to citizens' control over decisions of governance. In other words, I do not see the inter-institutional construction of judgment as answering the question of citizen competence that has been central in the literature of American politics: it does not provide an answer to what Lupia and McCubbins call "the democratic dilemma" – the question of whether citizens are able to learn the things they need to know in order to govern in their own interest (1998).

That said, even if we do not take this "democratic dilemma" approach, we have reasons to care about citizen competence in a democracy. In short, if we bracket the

question of whether democracy exists – perhaps because we have other ways of evaluating democracy besides citizen competence, like a thriving civil society, and the protection of fundamental political rights like voting – then we assume citizens play a role in governance, and we want governance to be driven by good judgment. This is the approach I take in this dissertation. I do not claim that the institutional construction of judgment confers democratic authority, insofar that it compensates for the specifically democratic reasons we care about citizen competence. But, I do claim that the institutional construction of judgment alleviates some of the concerns we might have over good governance in a democracy, particularly in institutions of mass democracy.

Furthermore, by setting the question of democratic legitimacy aside, we are, I suggest, less likely to fall into the trap the constructionist turn warns against – that is, of grounding good collective judgment in individual capacity. As those in the constructivist turn emphasize, an individual’s judgment at any one moment is very much a function of the immediate environment (such as the framing of survey question), as well as the larger, long-term environment (such as what frames have appeared in the newspaper over the past day, week, and years). If we are concerned with the “democratic dilemma,” we are rightfully concerned with individual capacity. But if we are not concerned with the “democratic dilemma,” individual capacity – particularly, the individual’s ability to differentiate between “educative” and “manipulative” education – need not be a central concern.

In the second chapter, I develop the distinct standard of collective processes of judgment described in the introduction. While this standard of good judgment does not evaluate democratic authority, it is nonetheless relevant to democratic theory, as it can be

used to evaluate the claim that mass democratic politics are antagonistic to good judgment. In my third and fourth chapters, I do just that, and use this standard of good judgment to examine how the judiciary and direct legislation influence collective processes of judgment.

The judiciary

From one perspective, the judiciary might seem an unusual institution to turn to study collective processes of judgment. Democratic theorists do not generally study the judiciary: they tend to take a formal, juridical approach, assuming the judiciary's normative mandate is to follow the rule of the law, not the people.² Take, for example, Hanna Pitkin's classic work on representation (1967). Although Pitkin (1967) interjects brief discussions of judges as representatives at various points, she only does so when "confront[ing]" the "multiplicity" of types of political representation (1967, 227-8). Judges, here, are in the company of monarchs and ambassadors – Pitkin's point is to stress the necessity of specifying the term "political representation" when it is used, as some representatives are highly insulated from public opinion (1967, 227-8). Because many democratic theorists see the judiciary as largely insulated from mass politics, the judiciary is a relatively untapped source for the study of collective processes of judgment. Also, the judiciary's (apparent) insulation from the electorate might lead theorists to see it as a check against the excesses of masses democracy, infusing democratic politics with

² An exception to this description of democratic theory is those who also engage in legal studies (e.g., Dworkin, 1985).

the good judgment of insulated and elite judges, whose obligation is to the law, not the people.

As an institution led by non-elected, life-tenured officials with the power of judicial review, the authority of the judiciary in a democratic system has been subject to much debate. The legal literature offers three models for conceptualizing the judiciary according to democracy theory: the authorizer, the interpreter, and the facilitator models. Democratic theory is only occasionally the subject of legal scholars' work, so these models are, in most cases, my interpretive impositions – my argument for how we might see three models of democratic legitimacy explicitly or (in most cases) implicitly supported in empirical and normative scholarship on the Court.³ Each approach has normative and empirical problems.

The authorizer model. I interpret “the authorizers” as locating the judiciary’s democratic legitimacy in its authorization by elected officials. I include in this group proponents of the “attitudinal model,” that is, those who claim that judicial decisions are primarily a function of judges’ policy preferences (Segal and Spaeth, 2002).⁴ I also include variations on the attitudinal model, such as those who see judges’ attitudes shifting along the lines of public opinion, due to “the force of mutually experienced

³ The central concern of legal scholars is not typically democratic theory, and therefore the democratic character of the judiciary is often alluded to, assumed, or implied. So, while democracy is sometimes a primary concern of legal scholars (Ackerman, 1991; Dahl, 1957; Elster, 2000; Ely [1980], 2002; Giles, Blackstone, & Vining, 2008; Graber, 1993, 2008; Lovell and Lemieux, 2006), it is often a secondary concern (Frymer, 2003, 2007; Gillman, 2002; Graber, 1998, 2005, 2006; Lovell, 2000, 2003; Pickerill and Clayton, 2004; Tushnet, 2006; Whittington, 2007), or, merely, considered relevant (Segal and Spaeth, 2002).

⁴ Even though Segal and Spaeth (2002, 429) explicitly try to avoid normative theorizing, I include them in this list as their prominent model can be legitimized through this authorization model, as it is in Giles, Blackstone, & Vining (2008).

events and ideas” (Giles, Blackstone, & Vining, 2008), as well as Peretti (1999), who construes justices as “indirect” representatives when voting according to their “political views, which have been consciously and deliberately sanctioned by elected officials competing for political control of the Court through the selection process” (84).⁵

I also include in this group the “regimes literature.” This literature emphasizes the judiciary’s authorization through the appointment process, but it sees the judiciary as part of a larger governing regime (e.g., Dahl, 1957; Gillman, 2002; Frymer, 2003, 2007; Graber, 1993, 1998, 2005, 2006, 2008; Lovell, 2000, 2003; Lovell and Lemieux, 2006; Pickerill and Clayton, 2004; Whittington, 2007). From the perspective of the regimes literature, the judiciary’s democratic character would be grounded in the appointment process and in the consistent actions of elected officials who have repeatedly upheld and expanded the judiciary’s original powers.⁶

I argue that the authorization model is incapable of legitimating these actions of the judiciary as democratic. Consider how, typically, democratic authorization works in normative theory. In normative theory, democratic authorization is legitimate when those who are authorized are strictly bound by the sovereign – Rousseau’s magistrates, for

⁵ This authorization is not the only way Peretti understands the Court to play a democratic role. She turns to the concept of pluralism to legitimate the Court’s role in a democracy: “the Court’s role as a redundant institution has value in terms of providing groups and values receiving insufficient attention elsewhere to have at least a chance at being included and represented in the policymaking process. This, in and of itself, should contribute over time to a broader consensus, increased systematic legitimacy, and greater political stability” (1999, 242). However, this pluralist conception is somewhat at odds with the authorization model – the former requires the Court to be responsive to demands of litigating groups, while the latter requires the Court to adhere to the policy platforms by which they were selected.

⁶ They do not argue that these connections are always good for democracy: Lowell (2000, 2003), for example, has argued that legislative deferrals to the Court might be, at least in part, driven by attempts to avoid accountability.

example, or, in principle, the large bureaucracies of modern states (*On the Social Contract*, 1762).⁷ Generally, such authorization is defended from a pragmatic standpoint (the people cannot do everything) as well as from the standpoint of expertise (experts will better execute the people's will than the people themselves). The latter argument is particularly relevant in the context of the judiciary, where it is sometimes said that judges are authorized because of their expert status.

But when the will of the people is vague or silent, or when oversight and enforcement is difficult, the authorization model seems to do more than authorize – it seems to remit sovereignty. And, it is important to remember, the legal scholars who are arguing with the authorizer model are not claiming that the judiciary is highly constrained, either by the text or by other institutions (such as the legislature or the executive); these scholars are arguing the exact opposite. The authorizer model, then, seems to base its claim for democratic legitimacy on an (implied) normative assumption that judges must strictly adhere to the word of the law; but, on the other hand, this model takes its bearings from empirical work that claims judges do the opposite. The problem is not with this set of legal scholarship (which I will build on in this dissertation), but with the concept of authorization that is being employed – it is this concept that the “constructivist turn” has undermined.

The interpreter model. As the name suggests, we can read this group as understanding the judiciary's role largely as one of interpretation. The people, according

⁷ Democracy seems to require more than authorization. Consider Hobbes, for example. Hobbes is often thought to be the grandfather of the authorization model, yet few, if any, would claim he is a democratic theorist: democracy appears to require greater participation in governance and at least some degree of political equality.

to this model, have instantiated their will in higher law. The Constitution is conceived of as the will of the people, and justices, as interpreters of the Constitution, carry out the people's will. I include in this group those who look to original intent, original meaning, or original understanding in constitutional interpretation (e.g., Justice Antonin Scalia, Justice Clarence Thomas, Robert Bork); those who see the Constitution as an instance of national precommitment (Elster, 2000); as well as those who argue that the Constitution receives periodic injections of popular will via constitutional "revolutions" (Ackerman, 1991); and those who argue that the Court's democratic character derives from its unique ability, as an institution insulated from the electorate, to protect certain fundamental rights upon which democracy depends (Dworkin, 1999).

In its most conservative, originalist forms, the interpretive model begs the question of why current citizenry should follow law created by citizens who are long dead. Some call this the Jeffersonian challenge, as Jefferson famously said that constitutions should be rewritten every generation, and that anything else is undemocratic (Letter to James Madison, Sep. 6, 1789). In response, Elster (2000) has argued that the Constitution is an example of a national precommitment, and thus there are good reasons to follow an "old will" rather than a new one. Ackerman (1991) has taken a different tack, arguing that revisions in the Constitution occur outside of the formal amendment process. Ackerman claims that, at decisive moments in national history (such as the New Deal), citizens leave their normal state of political passivity, engage in a constitutional "revolution," and provide governing officials with a clear mandate for Constitutional

change.⁸ For constitutional representative governments, the result of this model is a dualist conception of politics (Urbinati, 2006, 95-6). Democracy is confined to the moment(s) of constitutional founding (or revolution); this creates an order that is “discretely democratic” (Urbinati, 2006, 96)).

The interpreter model not only faces normative challenges; it also faces two empirical challenges, both of which echo the empirical challenges political scientists encountered when trying to locate “the people” and their “interests.” For one, it is easy to argue that the Constitution is not actually the will of the people. Some argue that the Constitution is the product of elites (e.g., Parenti, 1980), while others point towards the document’s contentious origins, which makes it difficult to locate “one real will” of the people (e.g., Rakove, 1996). The arguments directed at the Founding moment can also be directed at so-called constitutional revolutions. The problem is not only that one particular moment might be seen as contentious and unstable, and thus making it hard to

⁸ In making this argument, Ackerman, interestingly, makes a similar theoretical move that normative theorists of representation would make fifteen years later, and which, according to Disch (2008), Pitkin (1967) made twenty years earlier. In his reading of *The Federalist Papers*, Ackerman (1984) argues that the Founders saw the division of branches countering the assumption “that when Congress (or the President or the Court) speaks during periods of normal politics we can hear the *genuine* voice of the American people” (1027). Such an assumption is, Ackerman claims, “naïve synecdoche” (1984, 1027). While Ackerman’s fracturing of the “genuine voice” is a radical move away from mandate representation, he, like Pitkin (1967; Disch, 2008), falls back into the mandate model with his argument that “revolutionary politics” *can* be construed as the people’s genuine will. Or, perhaps, we should say that Ackerman simply did not go as far as Pitkin and contemporary theorists: in his warning that the legislature does not stand in for the people, Ackerman appears to have seen a problem of “*misplaced* concreteness or reification” (my italics), not, necessarily, a problem with the “concreteness or reification” of “the people” (1984, 1026).

identify a coherent will; it is also that these “moments” might be better characterized as dynamic processes.⁹

Furthermore, the course of the development of constitutional common law cannot be linked to the episodic exercise of the will. Consider “expansive federal power; expansive presidential power, particularly in foreign affairs; the current contours of freedom of expression; the federalization of criminal procedure; a conception of racial equality that disapproves de jure distinctions and intentional discrimination; the rule of one person, one vote; a (somewhat formal) principle of gender equality; and reproductive freedom protected against criminalization” (Strauss, 1996, 929). None of these principles are clearly “rooted in original intent,” nor do they have “particularly strong textual roots,” nor is there an obvious “‘moment’ at which a strong popular consensus crystallized behind them” (Strauss, 1996, 929).

The facilitator model. I include in this group scholarship that identifies the judiciary as a promoter and/or protector of democracy. For example, one might argue the Constitution is essentially a proceduralist document that provides the structure for democratic self-rule (Ely, 1980). The role of judges is to enforce those procedures, which is particularly important as elected officials have incentives to alter procedures in order to gain electoral advantages. Others have argued that the facilitating role of the judiciary is through the encouragement of consent. That consent might be based on the belief that the Constitution is a contingent agreement, and so “enticing losers into a continuing

⁹ Methodological work in political development has also problematized the sort of periodization employed by Ackerman, which, it is argued, overemphasizes temporal discontinuities and overlooks continuities (e.g., Kersh, 2005; Mayhew, 2005; Orren and Skowronek, 2004; Skowronek, 2002; Thelen, 2003).

conversation” (Seidman, 2001), or it might be based on the belief that the judiciary can instigate and foster deliberation among political actors when there is disagreement, generating the democratic outcome of accommodation based on mutual respect (Burt, 1992). Or, the judiciary can be construed as facilitating democratic deliberation when it follows a particular doctrinal approach, such as minimalism, and protects “core” values (Sunstein, 1993), or through the behavior of Court justices, who might address other political actors through their opinions and dissents (Guinier, 2009). Or, judicial review can be understood to “force[s] political debate to include argument over principle” (Dworkin, 1985, 70).¹⁰ Certain “out-of-favor Supreme Court decisions” are also pointed to as inciting debate (Hamilton, 2009, 121).

The facilitator model raises the question of why a small number of unelected justices with life tenure are needed to regulate, protect, and develop democracy.¹¹ Recall the empirical work of the “constructivist turn” – this work suggests that there is no such thing as impartial facilitation. It implies that those who “facilitate” are, in fact,

¹⁰ Dworkin, here, might come closest to claiming that the judiciary contributes to a collective process of good judgment. However, this is a claim Dworkin only introduces at the end of an argument against originalist and proceduralist justifications of judicial review; he does not develop this point.

¹¹ Waldron (2006) sums up this view: “By privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights” (1353). Possibly the most frequently rejoinder to those who, like Waldron, would abolish judicial review, is that the populace must be protected from itself – there is the concern with the tyranny of the majority, as well as the people’s tendency to not, on occasion, recognize what is “in its best interest,” and get carried away by immediate, short-term concerns, or inflamed passions. But these are not obviously democratic arguments for judicial review; these appear to be liberal argument for judicial review. While some might argue that there are certain substantive values that democracy requires (e.g., Dworkin, 1999), even those who take this position, such as Sunstein (1999), often still urge deference to legislative bodies when possible, suggesting concerns with the Court’s legitimacy as a wholly democratic institution.

constructing “the people” and their “interests” through the facilitation process. It thus suggests that the source of the judiciary’s democratic legitimacy cannot *only* be their role as impartial facilitators.

This dissertation departs from other approaches to the judiciary. I argue that it is precisely the judiciary’s politicized relationship to mass politics and other institutions that enables its contribution to the construction of good collective judgment. To be clear, these contributions do not provide the judiciary with a specifically democratic form of legitimacy; rather, I argue, its contributions are epistemic. To make this argument, I take advantage of a tradition in public law scholarship that studies the judiciary in an interbranch context (see Barnes, 2007, for an overview). Once one considers the courts’ relationships to other governing institutions, it is clear the court is an active participant in mass politics, and contributes – often indirectly – to collective processes of judgment. Social movements, for example, intentionally use the judiciary to draw attention to their causes, grow their ranks, and thus gain voice in democratic forums, like direct legislation or legislatures (e.g., McCann, 1994). Certain highly salient judicial decisions contribute to the escalation of conflict and countermobilization (or what some call “backlash,” see Greenhouse and Siegel, 2011, 149), while other decisions prompt legislative responses (e.g., Keck, 2009). I also argue that the judiciary’s contribution relies less on the enlightened and impartial judgment of judicial officials, and more on the institutional structure of the judiciary – such as rules of standing – and those who pursue change through litigation. This dissertation reinterprets responses of citizens and other institutions to the judiciary as part of the process of collective judgment, arguing that the judiciary contributes to collective good judgment.

Direct legislation

Much democratic theory (and perhaps intuition) suggests that direct legislation – ballot initiatives (popular votes which create new laws) and referendums (popular votes on existent laws) – is the institution least likely to contribute to processes of judgment. This institution of mass democracy falls far short of deliberative democrats' ideal of relatively symmetric power relations, and appears particularly vulnerable to the manipulations of powerful individuals and groups. Direct legislation has also been charged with restricting minority rights – one study found that the pass rate of those initiatives seeking to restrict minority rights is much higher (78%) than the average initiative pass rate (33%) (Gamble, 1997). It has also been criticized for generating confusing ballots, which, besides being a problem in itself, also contribute to biases against particular groups, such as the poorer and less educated (Magleby, 1984, 1994). Direct legislation, it is said, oversimplifies complex issues (Zimmerman, 1986). Direct legislation has also been charged with creating divisiveness, dominating the political landscape with issues only of concern to narrow interest groups, and limiting political participation to a yes/no vote (Magleby, 1994). And, some argue, direct legislation makes legislatures ineffective: for example, California's Proposition 13, which increased barriers for taxation, has been blamed for problems with the state's educational system (see, e.g., O'Leary, 2009).

These concerns make direct legislation an ideal case to evaluate the claim that mass democratic politics are antagonistic to good judgment. But there are other reasons to examine direct legislation, as well. For one, the use of direct legislation, and its influence

on U.S. politics, is rising (see e.g., Lupia and Matsusaka, 2004; Donovan, Tolbert, and Smith, 2009). If we want to understand how collective judgment is constructed, we should not ignore influential institutions. For another, because institutions like direct legislation have largely been ignored by deliberative theorists, they are a particularly rich source for studying the construction of judgment. The case of direct legislation not only offers insight into one of the most prevalent political processes in the U.S., it also offers different institutional features to analyze.

In my fourth chapter, I note that certain assumptions about direct legislation – like the ease with which powerful corporate interests can dominate discourse and so determine outcomes – are not entirely borne out by empirical work. Instead, a more complex picture of direct legislation emerges. My evaluation further complicates the picture. I show that direct legislation’s contributions to collective processes of judgment are contingent on its relation to other institutions. For example, the timing of initiatives – specifically their concurrence with highly salient electoral campaigns – combined with past and current campaign finance law, enables great disparities in wealth to make direct legislation less hospitable to good judgment.

Conclusion

This dissertation asks how the design of governing institutions contribute to the judgments those institutions produce. To answer this question, I develop a notion of good judgment that is a dynamic and collective process. I demonstrate that the capacity of an institution to generate good judgment depends on its relation to other institutions. One implication of this dissertation is that mass politics is not necessarily in tension with, or

antagonistic to, good judgment. Another implication is an alternative understanding of the authority of direct legislation and the judiciary. Direct legislation is not necessarily an impoverished site of judgment formation, as some analyses of mass democratic politics suggest. And while some theories argue that the U.S. judiciary's authority depends on its insulation from mass politics, I instead argue that it is the judiciary's connections to mass democratic politics that enables its authority; this is not a specifically democratic authority, however – it is an authority derived from its contributions to collective processes of judgment.

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Chapter 2

Good Judgment

In the previous chapter, I explained how challenges to the old standard for evaluating democratic representation – the standard of congruence – prompted a turn to judgment, specifically, collective processes of judgment. In this chapter, I begin developing a distinct standard of good judgment that I will use in later chapter to evaluate collective processes of judgment within and between institutions.

In the first part of this chapter, I discuss Condorcet's 1793 proposal for a new French constitution. Theorists have recently turned to his proposed constitution as an example of the institutionalized circulation of judgment and construction of "reflexivity" (Disch, 2011; Rosanvallon, 2011; Urbinati, 2006). Condorcet's design promoted a reflexive process of deliberation within and among institutions. For example, his constitution created a series of local citizen assemblies, among which legislative proposals were circulated, and deliberated upon. Condorcet's constitution can be read as a move toward the depersonalization of judgment: the source of judgment is not only individual capacity, but – at least in part – an institutional design where inter-institutional relations are of central import.

However, I argue that Condorcet did not rely solely on governing institutions to generate good judgment. He also intended his constitution design to be supplemented

with a system of public education. I read Condorcet's emphasis on the development of citizens' capacities as foregrounding the need for good judgment not only at the level of institutional design, but also at the level of the individual. This fostering of individual level capacities through education is what, I argue, made Condorcet's constitution democratic. Without the individual capacity for judgment, it is unclear what, if any, sort of power citizens would be exercising in a collective process of judgment. Condorcet's plans for public education thus points to the limits of the design of governing institutions. Governing institutions may be designed to promote a process of collective judgment, but this design may not offer traction on the question of who is leading that collective process. So, instead of understanding the judgment-based contributions of governing institutions in terms of democratic authority, I suggest we understand judgment as a distinct evaluative standard.

In the second part of this chapter, I develop this distinct evaluative standard of good judgment. In using the word good, I mean something like soundness; however, I use good instead of sound to reference an underlying hopefulness that sound judgment will generate good outcomes, however so understood. I begin developing this idea of good judgment with the concept of reflective equilibrium. In the first part of this chapter, I trace the concept's transformation through three different areas of inquiry: science, morality, and politics. I use the work of John Rawls and Norman Daniels to outline reflective equilibrium as a standard for processes of individual and collective judgment. Reflective equilibrium is non-foundationalist, multi-directional, and largely procedural; as such, it is well suited to a concept of judgment that embraces pluralist politics, and follows the constructivist turn in democratic theorizing.

However, reflective equilibrium is not an entirely unproblematic concept – it can be read as urging convergence on a unitary value system, and it can be criticized for its abstract, intellectual character. To restrict judgment to abstract reflection and debate is “like Scholastic science,” to quote Elizabeth Anderson (2006, 5.). Anderson’s work on Mill and Dewey (Anderson, 1991, 2006) shows how the construction of good judgment requires more than reflection and deliberation. For example, good judgment also takes into account the observed consequences of commitments, and so is fostered by looking to individual and collective experience. In this chapter, I begin developing a standard of good judgment, using both the concept of reflective equilibrium, as well as criticisms of the concept.

The institutional construction of collective judgment

In Condorcet’s constitution, we see an instance of institutional design directed at the construction of collective judgment. Condorcet was, like many theorists of the 18th century, concerned with providing a check against the “passions” of popular rule. But unlike those who sought a check outside the democratic system (the “disinterested” government of aristocrats, experts, or, perhaps, judges), Urbinati argues Condorcet proposed a democratic “check” by creating a *reflexive* system of representation (2006, 195-6).¹² If it had been implemented, Condorcet’s constitution would have created a complicated institutional structure that required prospective laws to be reviewed by many

¹² I should emphasize that Urbinati does not describe this process as “reflexive”: I take the term from Rosanvallon (2011), and follow Disch’s reading (2011) of Urbinati’s “indirect” as similar to “reflexive.”

different actors, in different settings, and at different times. Condorcet's design was not a balance of (macro) powers, but a "diffusion" of power (Urbinati, 2006, 195).

Condorcet's constitution diffused power in a number of ways. First, he broke up the legislature – his constitution prescribed a committee structure (which is most unusual for a constitution prescription, particularly in the late 18th century, when constitutions tended to be vaguer). Next, he created a series of local assemblies, made up of citizens, and provided them with their own assembly hall. Proposals for legislation were to be circulated and reviewed among and between the committees, and the many local citizen assemblies. This meant that the passing of proposals was not unidirectional, but circular.

The result was that lawmaking was diffused – *physically*, requiring the input of many citizens in different places, and *temporally*, as the legislative process was interrupted by prescribed time delays, as well as the necessity of circulating proposals. This indirect character of lawmaking supposedly encouraged reflection and deliberation, continuously invoking citizen judgment. Laws were thus generated by all citizens in a "reflexive" process. Judgments were exchanged between individuals, local (or "primary") assemblies, the national assembly, and committees within the national assembly. Condorcet's institutions constructed and "realized" these different interests (as proposed law or proposed repeals), and forced them to deliberate with each other. The goal was not to create the ideal conditions for deliberation within any single institution or institutions, as is arguably the case with much contemporary deliberative theory (Chambers, 2009). Instead, judgment was constructed by attending to both internal institutional design, as well as the relationships among different institutions.

In this constitutional design, individuals and (institutionally constructed) associations were asked to engage in a mutual adjustment of their commitments in an iterative process, as proposed laws and repeals are circulated. No particular institutional site is privileged; all are equal in the adjustment process. Furthermore, no principle, theory, or considered judgment is fixed; as Urbinati stresses, one of the most striking – and judgment invoking – features of Condorcet’s proposal was the power to repeal laws and, at any time, call for elections of new representatives (2006, 213-221). Condorcet also listed a “right to review, to reform and to change” the constitution in his opening “Declaration of the Natural, Civil, and Political Rights of Man” (Art. XXXIII). In addition to its iterative reflexivity and provisionality, we can also think of Condorcet’s prescribed time delays as instituting (or attempting to institute) the conditions necessary for “considered” judgments.

In these ways – institutionalizing conditions for considered judgment, requiring collective and individual commitments to reflexively adjust themselves to one another, and emphasizing provisionality – Condorcet’s proposed constitution suggests one way of conceiving the institutional construction of collective judgment. His constitutional design also indicates the depersonalization of judgment at a conceptual level: the burden of good judgment is (at least partly) shifted from individuals to the design of institutions, with particular attention given to inter-institutional relations.

Condorcet and the limits of the design of governing institutions

The limits to the design of governing institutions is something of which Condorcet was well aware. Although democratic theorists have recently turned to

Condorcet for a model of reflexivity and the circulation of judgment (Disch, 2011; Rosanvallon, 2011; Urbinati, 2006), they have not also considered how Condorcet intended to supplement his constitutional design with a system for public education. Condorcet's plan for French democracy had, I argue, two parts: not only the constitutional design outlined above, but also a system of national education. Ignoring Condorcet's educational designs obscures Condorcet's emphasis on the development of citizen capacities, outside of governing institutions' potential educative effect. It also obscures how democracy depends on the capacity of citizens, not just the design of governing institutions.

Besides the broad tendency for Enlightenment thinkers to emphasize education's role in the development of "citizens," one of the first pieces of evidence we have for the entwinement of Condorcet's constitutional designs with education are his actions as head of the Academy of Sciences (a French organization of scientists, connected to the state). In 1774, Condorcet attempted to reorganize provincial scientific assemblies such that all would operate through the central Academy. His aim was provincial assemblies' "freedom from the influence of social hierarchy, equality among the academicians, [and] uniform organization" (Baker, 1975, 54).

His plan for scientific reform was developed in parallel with his friend Turgot's *Memoire sur les municipalities*: the theme of both was "the rationalization of both political and scientific organization; the direction of scientific activity towards the greatest public utility and human well-being; the diffusion of enlightenment" (Baker, 1975, 55). In his biography of Turgot, Condorcet would write that Turgot's assemblies' "utility depends entirely upon the education of their members and the intelligence that

inspires them; and it was a question in France of giving a new education to a whole people, of stimulating new ideas within it at the same time as it was being called to new functions” (Baker, 1975, 55). Baker claims, “The advancement of science was intimately associated in [Condorcet’s] thought with the rational organization of society, for scientific advance produced citizens capable of cultivating the moral and political sciences that were the basis of rational social and political conduct” (1975, 55).

While Condorcet’s plan for the provincial assemblies’ reform was never implemented – Turgot had fallen from power at this point, and the provincials’ resisted his centralization efforts – Condorcet returned to his plan during the Revolution, where it “became the very linchpin of an educational system intended to transform subjects into citizens” (Baker, 1975, 55). Around the time of the revolution, Condorcet produced a number of writings on education: “the five *Mémoires sur l’instruction publique* published between January and September 1791, and the *Rapport et projet de décret sur l’organisation générale de l’instruction publique* presented to the Legislative Assembly, on behalf of its Committee on Public instruction, in April 1792” (Baker, 1975, 295).

Baker writes that the *Mémoires sur l’instruction publique* begins with two assumptions, “the natural inequality of individual faculties and talents” and “the natural equality of individual rights” (Baker, 1975, 293). These two realities produced two threats in a democracy – one, governance by “stupidity,” an outcome quite likely in modern society, where divisions of labor narrowed the masses’ education; and, two, devolution to governance by technocrats or experts (Baker, 1975, 293-4). In order to guard against both, Baker writes that Condorcet argued for a public, noncompulsory, primary education, “to make possible a real equality of rights and a real liberty of

individual choice and action” (Baker, 1975, 295). Citizens would receive a basic “introduction to the physical sciences,” in order that they might not be deceived by “these great prejudices that have seduced nations,” while also receiving a civic education in the moral and political sciences (Baker, 1975, 297). To help execute this project of public education, Condorcet suggested a return to his 1774 proposal for the reformation of the provincial academic assemblies.

Condorcet’s work on education suggests that the political institutions of his proposed constitution of 1793 was only one prong of his democratic designs. If the theory taken from Condorcet is one of reflexivity, emphasizing the differentiation his design produces in order, presumably, to refer back to itself, it is important to note that Condorcet did not see the circular action of reflexivity to be sufficient for the attainment of democracy. The reflexivity of his political institutions could not provide a full guard against either “stupidity,” or the rise of an aristocracy. As with other recent theorists (e.g., Mansbridge, 2003), Condorcet saw the circularity of the representative process requiring citizen education: education provides the means for citizens to recognize their own interests, and to differentiate between good and bad legislation, and good and bad representation.

Citizens would make their “right to rights” a reality by choosing those political representatives who were capable of impartial and disinterested rule. For Condorcet, this meant that citizens need to be competent judges, which, for him, implied the ability to reason, the ability to recognize the limits of their reason (and the superior reason and knowledge of others’), and the ability to know their own interests:

In this way reason, become popular, will be truly the common patrimony of entire nations. In this way, with that exactness extending to moral ideas,

we shall see the disappearance of a contradiction shameful to the human mind, that between a wisdom that penetrates the secrets of nature or pursues the truths hidden in the skies, and a gross ignorance of ourselves and our dearest interest.

(Condorcet, *O.C.*, 7: 247-8; translated in Baker, 1975, 296)

Basic public education, for Condorcet, consisted of learning what we would today call “critical thinking skills,” as well as learning the most recent “positive principles of the moral and political sciences” (Baker, 1975, 299). Combining the two – positive principles and reason – would both allow and encourage citizens to judge legislation, and judge their representatives’ judgment.

Without citizens who had the capacity to judge, the equal rights of citizens, as well as governance in citizens’ interests, would remain only an ideal, not a reality. A reflexive system allows for the circulation of judgment, but the system’s political and moral value – that it governed in “the general interest,” and that it actualized citizen rights – depended, for Condorcet, on an existent base of good citizen judgment, that is “critical thinking” and principled beliefs. In this way, we can read Condorcet’s educational plans as emphasizing the importance of the capacity for judgment as the individual level, and pointing to the limits of the design of governing institutions. The design of governing institutions might foster a collective judgment, but that design does not guarantee democracy, or the protection of rights. Rather than thinking of the construction of good judgment as conferring a specifically democratic form of authority, then, I suggest that we understand judgment to have a distinct value. In the second half of this chapter, I begin developing a distinct standard of judgment, by thinking through what justification on both the individual and collective levels might mean.

Reflective equilibrium

Rawls, and his interpreter and fellow philosopher, Daniels, borrowed the idea of reflective equilibrium from Nelson Goodman's work on induction and justification in the sciences ([1954] 1983). Goodman proposed the concept (which he did not, it is worth noting, label as such) in the process of arguing that progress had been made in the problem of justifying induction ([1954] 1983, 59-64). Goodman claimed that the figure with whom contemporary philosophers associated the central problem of induction – Hume – had, unbeknownst to them, also offered the beginning of a solution. Hume pointed out that predictions could not be justified by reference to past observations or logical inference; this is “Hume's problem” of induction. Hume then suggested that the idea of the necessity of certain events – like being certain that when one lets a ball go mid-air it will not just hover there, but drop to the ground – was a habit of the mind. Goodman argued that what others had dismissed as mere description of practice was, in fact, a form of justification: in describing what constituted the practice of prediction, Hume had offered a way to differentiate between valid and invalid predictions.

This distinction, Goodman notes, gets to the heart of the idea of justification, for both induction and deduction. The validity of a deductive rule of inference depends upon the acceptability of its inferences, and vice versa. “If a rule yields unacceptable inferences, we drop it as invalid,” or amend it, and “an inference is rejected if it violates a rule we are unwilling to amend” (Goodman, [1954] 1983, 63-4). Justification – for both induction and deduction – is essentially circular and iterative, and it involves describing (or defining) valid rules.

We can understand moral justification in much the same way, Rawls and, one of his interpreters, Norman Daniels argued. But rather than scientific practice, we have the history of moral and political philosophy, and our own and others' moral intuitions. Rather than inferences, we have considered judgments; rather than rules, we have principles; and rather than scientific theories, we have "background theories" (Rawls, [1971] 1999, 7-9, 40-46; [1993], 2005, 384n16; quote is from Daniels, 1979, 259).¹³ Neither considered judgments, nor principles, nor background theories are ascribed a privileged role. Incoherence between any of these three levels of generality is resolved by adjustment to either considered judgments, principles, or background theories. This process of achieving reflective equilibrium is iterative. Reflective equilibrium is also unique in that it is scalable: a reflective equilibrium can be held among both individuals and communities.

For an individual to achieve reflective equilibrium, she moves back and forth between these three levels of generality, adjusting her commitments as she proceeded. She would achieve "narrow" reflective equilibrium – a status – when her considered judgments, principles, and background theories have been adjusted for coherence. But narrow reflective equilibrium is insufficient: what mattered both to Rawls and Daniels is that the individual also investigated others' moral theories, principles, and considered judgments. After putting her own commitments in (philosophical) conversation with others, and then proceeding to adjust her own commitments (following the same coherence constraint as before, again not privileging any level of generality), she could

¹³ To be clear, Rawls did not make the direct comparison that I have between the different levels of generality in science and moral theory.

be said then, and only then, to be in the relevant type of reflective equilibrium, that is, “wide” reflective equilibrium.

Wide reflective equilibrium was intended to be distinct from other evaluative theories, such as utilitarianism, simple intuitionism, and straightforward consistency. In emphasizing the distinct value of the different levels of generality, as well as the individual, reflective equilibrium denies that the conception of the good can be reduced to one measure. And in not privileging considered judgments, reflective equilibrium denies the priority of intuitions (see [1993] 2005, 96). And in requiring the examination of others’ commitments, reflective equilibrium requires more than simple internal consistency.

The conceptual distinction between narrow and wide reflective equilibrium is discussed in *Theory* ([1971] 1999, 43) but Rawls does not name it as such until “Independence of Moral Theory” (1974, §1) (Rawls, [1993] 2005, 8n8). As Rawls explains in “Independence,” the idea behind reflective equilibrium is to investigate “moral sensibility” (and “that does not presuppose the existence of objective moral truths” making moral theory, he argues, independent of epistemology) (7, 9). Adhering to Goodman’s insight regarding the relation between justification and description of practice, Rawls’s goal with wide reflective equilibrium in *Theory* is, to put it most simply, to theorize existent morality. As he puts it in “Independence,”

we investigate what principles people would acknowledge and accept the consequences of when they have had an opportunity to consider other plausible conceptions and to assess their supporting grounds. Taking this process to the limit, one seeks the conception, or plurality of conceptions, that would survive the rational consideration of all feasible conceptions and all reasonable arguments for them. (1974, 8)

But since “we cannot, of course, actually [have the people] do this,” Rawls argues we, as philosophers, should “do what seems like the next best thing,” and work out what conception or conceptions might exist at the limit (1974, 8).

In *Theory*, the *general* wide reflective equilibrium – that which is worked out for people, collectively – is generated by Rawls’s own adjustment between what he understands to be the most relevant (and so already existent) background theories, principles, and considered judgments. These he takes from “the conceptions of justice known to us through the tradition of moral philosophy and any further one that occurs to us”; this he says, is “the most we can do” ([1971] 1999, 43). The contract that Rawls constructs is a product of this mutual adjustment, and Rawls leaves it open it for future revision – to put it overly simply (leaving out the important steps of how reflective equilibrium is achieved), Rawls explains, “justice as fairness is the hypothesis that the principles which would be chosen in the original position are identical with those that match our considered judgments and so these principles describe our sense of justice” ([1971] 1999, 42). Rawls argues that this hypothesis, justice as fairness, is the basis for democratic institutions.

Political Liberalism ([1993] 2005) was, it seems, a revision to this explicitly revisable hypothesis. Rawls retained and continued to develop the central ideas of *Theory*, but as he makes clear in his introductions to *Liberalism*, *Theory* was “unrealistic” in that it required “all its citizens [to] endorse... [a] comprehensive philosophical doctrine” of justice as fairness (2005, xvii, xvi, see also xl). In other words, *Theory* did not sufficiently attend to the conditions of reasonable moral pluralism. So, in *Liberalism*, Rawls made a crucial distinction between comprehensive doctrines and conceptions. His

goal was to create a political conception of justice that stood independently of comprehensive doctrines ([1993] 2005, 12). A political conception has its own values and ends, and makes no commitment to comprehensive doctrines like utilitarianism, which, in contrast to “conceptions,” are expansive in scope – applying to all people, for instance, and organizing all “recognized values and virtues” ([1993] 2005, 13).

The wide reflective equilibrium of people (the general wide reflective equilibrium) thus came to mean something different in *Liberalism*. Rather than requiring a deep overlapping consensus of comprehensive doctrines, *Liberalism* only required that individuals’ – now, actually, “citizens” – achieve “congruence” (or not be in conflict) in the general and wide reflective equilibrium ([1993] 2005, 11; 96-98). Or, as he puts it in *Justice as Fairness: A Restatement*, what is required is “coherence” (2001, 32).

In other words, the reflective equilibrium achieved in the political conception does not reflect any one individual comprehensive doctrine – the political conception is too shallow (or abstract). But in its shallowness, this political conception of justice is congruent with all “reasonable” comprehensive doctrines, Rawls argued. Of course, much depends on what is meant by “reasonable.” However, for our purposes, the point worth noting here – and which we will return to it later – is that a collective wide equilibrium in *Liberalism* is consistent with a high level of disagreement among individual reflective equilibriums.¹⁴

That is the basis concept. But Rawls’s apparent claim to know what people believe is just, and to know how people would organize their democracy is, for some, the

¹⁴ For a more detailed discussion of this shift in Rawls’s concept of reflective equilibrium, see Daniels (2000). I have not followed his discussion here, as it is not simply an interpretation of Rawls, but also contributes additional conceptual distinctions.

epitome of liberalism's hegemonic aspirations, and its false neutrality. Sheldon Wolin, for example, concluded, "democracy is not a distinctive presence in *Liberalism*" (1996, 98). What Rawls created, Wolin argued, is a "guardian democracy," where an elite-prescribed constitutional structure constrains and "check[s] the demos" (1996, 100). "[A]n earlier age would have said [Rawls] legislates," Wolin suggested (when describing Rawls's use of public reason as a regulative principle for decisions on basic constitutional questions) (1996, 102). Wolin claimed that a notion of democracy not actually constructed by the people – and not just theoretically, but literally constructed through participation – is no democracy at all (1996, 98). An argument for the unjust status quo is what Rawls actually created, not a concept of democracy (1996, e.g., 100-1). In other words, Wolin claimed that Rawls's intention to transform reflective equilibrium from a purely philosophical concept into a practical political concept failed.

In his defense, Rawls repeatedly emphasized the provisional and, even, asymptotic character of reflective equilibrium (e.g., ([1993] 2005, 97). Rawls wrote, for instance, that reflective equilibrium "is a point at infinity we can never reach, though we may get closer to it in the sense that through discussion, our ideals, principles, and judgments seem more reasonable to us and we regard them as better founded than they were before" ([1993] 2005, 385). Rawls also, at at least one point, refers to reflective equilibrium as a "procedure," although he generally refers to it as a "status" (as a "procedure," see 1974, 7).

Significantly, the provisional character of the reflective equilibrium Rawls constructed in *Liberalism* was, he argued, dependent not simply upon his own philosophical search for reflective equilibrium. For example, Rawls explicitly rejected

Habermas's criticism that the original position is "monological" as opposed to dialogical – that it was, as Habermas claimed, only Rawls the philosopher who, on his own, created the concept of justice. In response, Rawls wrote, "it is you and I – and so all citizens over time, one by one and in associations here and there – who judge the merits of the original position as a device of representation and the principles it yields" (383n14). Rawls, it seems, intended for his proposition to ultimately depend on how citizens responded to it.

As the quote in the previous paragraph suggests ("we may get closer to it in the sense that through discussion... we regard them as better founded"), Rawls sometimes appears to write as if the relevant citizen response was located wholly in discourse and reasoning.¹⁵ However, Rawls also talks about institutionalization and practice, particularly so in *Liberalism*. Not only must we reflect, he wrote, "We also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments" ([1993], 2005, 381).

In fact, Daniels argues that the emphasis on "an institutional mechanism" for generating wide reflective equilibrium is "what is distinctive about Rawls's account after politicization" (by "politicization," Daniels means Rawls's shift to a political conception of justice in *Liberalism*) (Daniels, 2000, 141). Following Cohen (1994, 1530), Daniels argues that "institutions play an 'educative role'" (2000, 146). "For example," Daniels writes,

the idea of political equality is manifest in many features of democratic institutions, explicitly in claims about equality before the law and equal civil rights but also implicitly in the way in which citizens are forced to win

¹⁵ But to be fair, Rawls, in this context, was noting one similarity between Habermas's work and his own, so it would make sense that, here, he would emphasize discourse.

others to their projects in a political market and market context. These practices put pressure on people holding various comprehensive views to accommodate the idea of others as equal person and even as reasonable ones (Cohen 1994[a], 1532). People become attached to ideas they become familiar with and understand through these experiences. But this attachment need not be thought of as mere indoctrination; it is reasonably viewed as the result of learning and education. (2000, 146)

In other words, Daniels reads Rawls as arguing that institutions help generate, over time, *convergence* on a political conception of justice.

One could also argue that the convergence reading of institutions' role is a departure from Rawls's own thinking. As I noted above, Rawls did wish to consider "how well [constructed] principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection," ([1993] 2005, 381). Rawls, here, suggests that some results might not "fit," and so certain institutions should be rejected; this practice of rejecting principle or theories based on unacceptable inferences is at the core of the idea of a reflective equilibrium. Or, one could also argue there is a tension in Rawls, between, on the one hand, his early hope for convergence over time (rooted, perhaps, in a faith that liberal democracy would culminate in – or itself is – a universal moral truth), and his growing recognition of the reality of a deep and ultimately irreducible moral pluralism. Here is where it is helpful to set Rawls and his interpreters aside, and consider additional ways of thinking of justification. I begin developing a distinct standard of good judgment by returning to its origins in the philosophy of science.

Good judgment

Goodman's theory of justification suggests that good judgment should involve not only the reflexive adjustment of theories, principles, and particular considered judgments over time, but also an active search for unacceptable inferences. One of Goodman's aims in developing the idea of reflective equilibrium was to show that progress had been made in understanding the logic of induction, and it was prompted by the generation of unacceptable inferences. As I noted above, Goodman ([1954] 1983) articulated the concept of reflective equilibrium in the process of arguing that Hume had not only posed "the" problem of induction, but that he had also made steps toward its resolution. Hume's move to description was a first step, although it was incomplete, as it did not rule out unacceptable inferences. Likewise, Hempel made further progress, adjusting the rules in order to rule out further unacceptable inferences, although, as Goodman pointed out, it continued to generate at least one unacceptable inference ([1954] 1983, 67-81).

We can read Goodman as making an argument for the possibility of learning even without convergence, at least in any thick sense: we can know something about induction, Goodman argued, without knowing exactly what it is. How do we generate this sort of knowledge? We look to unacceptable consequences, Goodman says, consequences that we realize our unacceptable not only through the rules of logic, but also because of their inconsistency with observation, including observed practices.

In his own work, Goodman largely relied on logic and thought experiment to flush out unacceptable consequences. Anderson, however, has suggested that lived experience is also a rich source of knowledge: lived experience can indicate the unacceptability of particular judgments. Instead of relying wholly on the circular

adjustments of reflective equilibrium, Anderson argues we should turn to our own experiences and responses for evidence of value judgments' worth. For example, we can live according to value judgments and learn whether certain values are "fruitful" – if they help "us discover *new* things we value, that we had not imagined before" (2004; quote, 2006, 4).

To exclude experience from the justification of values, as Anderson argues moral philosophy's use of reflective equilibrium does, is to limit justification to the confrontation of different "moral opinions, without any connection to the wider world" (2006, 5). "This is like Scholastic science," she says, "to figure out the truth about the world, people reasoned from the opinions of Aristotle and his commentators, rather than going and gathering observations based on experiments" (2006, 5).

Emotional experiences, Anderson argues, can serve as evidence for value judgments (1991, 2004, 2006). By emotional experiences, Anderson means "affectively colored experiences of persons, things, events, or states of the world," for example, "joy in seeing someone" (2004, 9). Emotional experiences can satisfy the three conditions needed for a mental state to be "capable of standing in evidentiary relation" to value judgments: they can "have cognitive content," can be independent of value judgments, and can be defeasible (Anderson, 2004, 9).¹⁶ We can also understand emotional experiences as capable of being "*reliable* or *trustworthy*" evidence – once acknowledging that emotional experiences are capable of being evidence, Anderson argues, "we would

¹⁶ Note that for any particular emotional experience to count as evidence, it must meet all three conditions. Anderson does not argue that all emotional experiences do meet all three conditions, just that emotional experiences are capable of meeting these conditions.

be *crazy* not to” attend to them (2004, 9, 10). Ignoring the evidence of emotional experience is, Anderson points out, dogmatism (2004, 10).

Anderson illustrates her argument with an example. Take Diane, she says. Diane excitedly begins a career in politics. However, Diane finds the actual experience of political life “intolerable – she is dispirited by the backbiting; she feels compromised by what she needs to do to raise campaign funds; legislative victories feel hollow” (Anderson, 2004, 10). Here, her emotional experience has cognitive content. It also exists independently of the prior value judgment (she found it intolerable when she had previously judged it to have positive value). Finally, it’s defeasible – Diane could have a friend, Sharon, who might persuade her that her disillusionment was unfounded, that she should take a long-term perspective, and that an apparently hollow legislative victory was actually meaningful, so she should instead feel “triumphant” (Anderson, 2004, 10). And to tell Diane to simply ignore her emotions here, to retain her initial value judgment that politics is a worth pursuit, would be crazy – it would be to ignore the evidence, and so act dogmatically (Anderson, 2004, 10).

Anderson’s work on value judgment suggests two reasons why we might want to extend the concept of good judgment beyond reflective equilibrium to emphasize the value of lived experience. For one, it has the potential to increase reflective equilibrium’s justificatory power, by increasing the scope of evidence. In addition to “moral opinions” we can include the evidence of fruitfulness and emotional experience. We might even say that to *not* take into account these responses to lived experience is to dogmatically ignore relevant evidence: that is what Anderson argues (2004, 10).

We can also think about lived experience as another way of addressing the criticism that reflective equilibrium reduces to the undemocratic abstract idealization of one philosopher (or perhaps an association of philosophers, as Rawls no doubt engaged and employed the ideas of others). Emotional experiences might themselves prompt reflexivity among those who are not philosophers. Such is the case, Anderson argues, with Mill. It was Mill's emotional experience with depression, and the failure of utilitarianism to account for it – the lived experience of conflict between emotions and prior moral judgment (judgment which, it's worth noting, was not simply an abstraction, but structured the way Mill lived) – that prompted his re-evaluation of utilitarianism (Anderson, 1991, 26).

Of course, debating and deliberating over moral theory might prompt an emotional response – perhaps as we imagine the implications for our lives or others lives – but that emotional response does not meet the evidentiary requirements Anderson posits until we have actually *lived* those implications. This is because we don't know exactly what these implications will be – we don't know what experiences we will have (this is the claim Anderson makes – if we did know, then our emotional experiences would not be independent of our prior value judgments, and so would not count as evidence). Our experiences might well lead us to reject theories, principles, or judgments that we have affirmed. As the example of Mill and the work of Goodman suggest, such experiences of dissonance can prompt the reflexivity that improves judgment.

Yet it is also true that Anderson's analysis operates at the level of the individual; this being the case, can her potential contributions to a standard of good judgment -- actively searching for unacceptable consequences of commitments, and alertness to the

evidentiary value of lived experience, including emotions – be institutionalized in systems of governance? Can we use these criteria to evaluate collective processes of judgment, or are they only meaningful at the individual level? In my study of the judiciary in the next chapter, I show how these criteria can be used to evaluate governing institutions' contributions to collective processes of judgment.

Conclusion

From one perspective, Condorcet's plans for public education suggests that democracy ultimately depends on citizens, not the design of governing institutions. We can read Condorcet's emphasis on the development of citizens' capacities (or moral powers) as foregrounding individual responsibility.

There is another way to think about Condorcet's educational design, however: we can read it as a move towards the depersonalization of judgment. By incorporating the capacity for judgment into his institutional design, Condorcet helped shift the burden from individuals to a system of institutions. To read Condorcet in this latter way suggests the limits of the design of governing institutions: governing institutions might foster collective processes of judgment, but such collective processes do not guarantee liberal democratic outcomes. But even without this guarantee, there might still be value in good judgment.

In this chapter, I began developing a distinct standard of good judgment to evaluate governing institutions. My discussion of Rawls's concept of reflective equilibrium, as well as some of his critics, suggests that good judgment has several elements. Good judgment is the individual and collective adjustment of commitments

over time in light of one another, privileging no one commitment, or set of commitments. Good judgment also involves attendance to the consequences of commitments, including the reflexive integration of evidence generated by individual and collective experience. Finally, good judgment offers no guarantee of liberal democratic outcomes.

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Chapter 3

Judgment and the Judiciary

In the previous chapter, I argued that good judgment involves the reflexive adjustment of different commitments in light of one another, without privileging any one commitment or set of commitments. Good judgment seeks to uncover the unacceptable consequences of commitments, and is alert to the evidentiary value of lived experience, including emotions. With Condorcet's proposed constitution, we saw how a diffused and divided system of institutional design can give voice to different commitments and concerns, and so generate a process of collective judgment; I suggested we understand this as a move towards the depersonalization of judgment. However, Condorcet's approach – complementing his constitutional proposal with a public education system – also suggested the limits of the design of governing institutions. Governing institutions' contributions to good judgment do not guarantee liberal democratic outcomes. Instead, I argued, we should think of judgment as an evaluative standard distinct from questions of liberal democratic authority.

In this chapter, I turn to the U.S. judiciary. I argue we should assess the judiciary in terms of its relations to other institutions, not in terms of the rights it does or does not protect, or its adherence to laws passed by elected officials. I argue the U.S. judiciary can contribute to good judgment – good in terms of justification – by giving voice to different

commitments, and prompting these commitments to engage with other commitments expressed in different institutional locations. The particular contributions of the judiciary are rooted in the nature of the adjudicatory process. Because adjudication requires actual controversies, the judiciary is particularly suited to seek out unacceptable consequences of held commitments. And because the judiciary requires litigating parties to be affected by the relevant law, it is also particularly positioned to be attentive to the lived experience of those consequences. Finally, because adjudication involves reason-giving, it encourages emotions to be articulated in a defeasible form, and so enables emotions to contribute to the construction of good judgment.

It is certainly not true that the judiciary is always makes these contributions. If we want to use the judiciary's contributions to judgment to authorize its role in a democratic system, we would need to consider how often it contributes to judgment, as well as countervailing concerns. I do not take that project on here. Still, we can understand this chapter as providing additional conceptual resources for thinking through the judiciary's contributions to the U.S. system.

A number of scholars have shown how the judiciary can give voice to those otherwise excluded from the policy-making process (e.g., Frymer, 2003; Keck, 2009; Lawrence, 1990; McCann, 1994; Peretti, 1999; Zackin, 2008).¹⁷ That said, these arguments are largely grounded on exclusion from electoral policy-making: the implicit or explicit normative criteria is inclusive representation of interests (with the exception of Zackin, 2008). I build on these works, making the additional argument that such inclusion

¹⁷ Lawrence aptly calls this the "Carolene tradition," citing the *Carolene* footnote; she places Ely ([1980], 2002) and Bickel (1962) at the center of this tradition (1990, 90).

is also a collective good, as the inclusion of excluded voices improves the quality of collective judgment.

For one, the inclusion of diverse voices allows collective judgment to take into account the evidential contributions of situated knowledge. Our own judgments are all limited, to some degree, by our background assumptions, based on our own unique experiences. Incorporating diverse perspectives thus has the potential to bring new ideas to bear on old questions. Incorporating a diversity of individual perspectives can generate more evidence to support (or challenge) existing judgments. This epistemological argument for diversity is an old one: it is one component of Mill's argument for the value of free speech and experiments in living. More recent incarnations include arguments for the value of a feminist research agenda (Anderson, 2004; Anderson, 2006b), and for the value of "dissent" (Sunstein, 2003). Even if inclusion does not alter the conclusions of collective judgment, we can still understand that judgment to be improved, as its grounds for justification would have been strengthened.

Below, I show how inclusion by the judiciary can also introduce an element of reflexivity to the processes of collective judgment formation: otherwise excluded commitments and concerns are given voice by the judiciary, and given voice in such a way that other voices are encouraged to respond. We can identify two aspects of litigation that produce this element of reflexivity. One is through a process of "consciousness-raising," to use McCann's term (1994, 63).

Giving voice, and inviting response: consciousness-raising

People can gain voice through the mobilization of rights discourses, creating “perceptions of entitlement” (Scheingold, 1974, 131), and by “raising expectations” (McCann, 1994, 64; Keck, 2009, 157).¹⁸ This consciousness-raising typically occurs via the media coverage litigation can generate. Consciousness-raising can promote deliberation outside of the courts, and it can draw more people to the movement. Both effects of consciousness-raising invite responses from the voices generated by other institutions, like state legislature and national legislatures. Consciousness-raising, it should be emphasized, does not necessarily require a sympathetic court; litigants can still lose a lawsuit, while gaining voice, as my examples below demonstrate. In addition, consciousness-raising, while often an explicit strategy of interest groups, is not limited to interest groups. As I argue below, the inherently uncontrollable nature of litigation further contributes to the inclusivity of voices expressed via the judiciary.

How litigation can give voice to those otherwise excluded – and so make the judiciary a unique site for the articulation of certain voices – is demonstrated in the early history of the ACLU. While it does not always serve this role (I outline some constraints below), Zackin’s work on the ACLU suggests that the judiciary is particularly suited to giving voice to unpopular groups. Zackin’s work on the ACLU also suggests that social movement organizers believe that this is a role the judiciary can and does play, and these beliefs work as a sort of feedback loop: these beliefs encourage unpopular groups to

¹⁸ While critics of social movement’s use of litigation argue that citizens are unaware of the content of court decisions (Rosenberg, 1991), such criticism fails to consider how, exactly, social movements gain voice via the judiciary. Arguments for litigation’s value do not assume that people have any knowledge of courts’ legal reasoning: the claim is not that elite judges become the mouthpiece of excluded peoples.

appeal to the judiciary, making it even more likely that the judiciary becomes a site for articulation of unpopular groups' concerns.

While the ACLU is now recognized for its litigation efforts, it did not start out in the lawsuit business. Its shift toward litigation, Zackin (2008) shows, was a product of its failure to be heard in both formal "institutions and grassroots" efforts (371). In fact, the earliest members of the ACLU, like many other Progressives, eschewed litigation, seeing the *Lochner*-era courts as unsympathetic to their particular platform of social change (Zackin, 2008, 373-4). It was only when the ACLU's pamphleteering, protests, speaking tours, and lobbying of elected officials failed that they turned to the judiciary (Zackin, 2008, 373-4). The early ACLU's failures can, Zackin argues, be largely attributed to the people it represented, who were some of the most unpopular of the age: "labor leaders, socialists, and communists" (2008, 381).

Likely inspired as well by the NAACP (which had long used the courts as a political tool), the ACLU took on litigation as a key mobilizing strategy in the 1920s. The ACLU's turn to the courts, Zackin argues, preceded their belief that the courts would support their arguments for reform; they found value in the publicity litigation produced (2008, 375, 380, 381, 386). In other words, ACLU's litigation strategy used the courts to promote deliberation *outside* the courts – both for and against ACLU's policy position – after the unpopularity of those it represented resulted in exclusion from other democratic forums (Zackin, 2008). Deliberation outside of the courts can then invite responses from other institutions.

Consider, for example, the pay equity movement. In his study of the pay equity movement, McCann (1994) shows how movement leaders intentionally used litigation as

a “catalyst” and form of “consciousness-raising” (58-74) that could then provoke a response in and by other forums. McCann show how the pay equity “issue became newsworthy during the period of favorable court decisions,” and that “the overwhelming majority of [articles granting substantial attention to pay equity issues] explicitly concerned lawsuits and legal issues” (1994, 59). Media coverage of the other political actions the pay equity movement took – like “legislation, electoral campaigns, labor strikes, and union negotiation battles” – was “dwarfed” by coverage of their lawsuits (1994, 59).

For example, consider a well-covered Supreme Court decision, *The County of Washington, Oregon v. Gunther* (1981), which was followed by “over a dozen new EEOC charges and lawsuits, state task forces and commissions, and other efforts by unions and women’s groups,” including one union’s first pay equity strike (McCann, 54, 53). In discussing a Washington state lawsuit that followed *Gunther*, one movement leader told McCann that it “really raised people’s consciousness about what unions can do and about the value of organized action for women workers. People were educated about the issue by the continuing stories in the newspaper. People really started to get active around the cause after the suit was filed” (1994, 70). Another movement member agreed that the lawsuit “really did politicize a lot of people, at least to the extent of understanding the issue and doing something about it.... [It] was the major rallying point” (1994, 70). The pay equity movement shows how litigation can introduce previously excluded voices to the larger public – both directly through media coverage, and by raising a movement’s numbers – enabling those excluded to have a voice in other forums, and invite responses from politicians in electoral institutions and from

bureaucrats. Note, also, that these responses need not all affirm the movement: the point for a collective process of judgment is that these questions were put before the public, and invited response.

Another way to understand this consciousness-raising role of litigation is through the concept of “outside lobbying” (Kollman, 1998). Outside lobbying involves “attempts by interest group leaders to mobilize citizens outside the policymaking community to contact or pressure public officials inside the policymaking community” (Kollman, 1998, 3). Outside lobbying takes advantage of both the movability of public opinion, as well as elites’ difficulty in gauging issue salience (which is relatively volatile) (Kollman, 1998, 25-6). It can take essentially two forms – one is signaling the salience of an issue to policymakers, the other involves actually increasing salience by “conflict expansion” (Kollman, 1998, 12). We can see both forms at work in the publicity-oriented litigation described by Zackin (2008) and McCann (1994). Litigation can be a way for groups to pressure elected officials to engage voices that have not been recognized in other democratic forums, both by “expanding the conflict” and signaling to officials the importance of an issue to the electorate. That the judiciary enables such outside lobbying generates reflexivity, as elected officials are pressured to respond to these newly included voices.

While both the pay equity movement and the ACLU are both examples of organized groups given voice through the judiciary, such articulations need not always be the product of a planned interest group strategy. Consider, for example, *Bowers v. Evans*, the 1986 Supreme Court decision that upheld the constitutionality of a sodomy statute. *Bowers* was also unplanned due to the decentralized character of gay rights litigation at

the time. The suit was initially sponsored by the Georgia chapter of the ACLU (acting without direction from the national ACLU office), but disagreement arose among the different litigators then involved in gay rights advocacy. Many thought that *Bowers* should not be pursued in the higher courts because it only brought a privacy claim, and did not include an equal protection claim.

The cooperating attorney who was litigating *Bowers* nonetheless continued with the suit. When, after much pressure from Lambda Legal, the first gay rights litigation group, the ACLU national office eventually lent its support, *Bowers*'s path to the higher courts can hardly be construed as the result of a planned strategy (Anderson, 2005, 84-5). Such "disagreement among counsel" is one of a number of factors that makes litigation campaigns "responsive and reflexive" to disparate voices (Wasby, 1984, 94, quoting Jack Greenberg, 1973; Wasby, 1984, 84). And, it is worth noting, such disagreements and lack of strategic planning is even more likely as the number of litigators increases (Wasby, 1984, 94).

Note that same-sex marriage, like *Bowers*, was also the product of litigants acting independently of interest groups: the case that put same-sex marriage on the national agenda, *Baehr v. Lewin* (1993), was also brought by a private attorney. The attorney leading *Baehr* had previously worked with the ACLU, but *Baehr* was not an ACLU case (Anderson, 2005, 178; Eskridge, 2002, 16-17). Gay rights litigators had not been advocating for same-sex marriage: it was only when they realized that *Baehr* would be an influential case, and that they could *not* afford to *not* get involved, that Lambda Legal offered its assistance (Anderson, 2005, 53). Yet another prominent example of interest groups' inability to control litigating voices is Olson's and Boies's challenge to

California's Proposition 8, which leading gay rights groups opposed until it was clear the case would not be stopped (Liptak, 2009; Svetvilas, 2010).

While *Bowers* was widely considered a loss for gay rights advocates, the decision placed the question of gay rights on the national agenda (Anderson, 2005, 94). *Bowers* is also credited with helping to mobilize gays and their allies. The 1987 March on Washington was "conceived in large part as a response to *Bowers*" (Anderson, 2005, 217). This gay rights demonstration attracted "hundreds of thousands," attracting, in turn, national coverage (Anderson, 2005, 217).¹⁹ *Bowers* became key in raising money for further litigation: Contributions to Lambda Legal, the leading gay litigation group, tripled in the year following the decision; on its own, the AIDS epidemic, which occurred over many years, would not seem to explain this sudden, massive spike in Lambda's funding (Anderson, 2005, 45-6).

We can interpret *Bowers* as catalyzing further political mobilization, which generated further litigation, which generated more responses from both the public and other institutions. Gay rights went on to take a prominent place on the national agenda in the decades following *Bowers*. This national discussion developed around four gay rights questions: gays in the military, the constitutionality of discrimination laws, gays in the Boy Scouts, and gay marriage (Anderson, 2005, 117-8). Anderson argues that all four of these issues were placed on the national agenda by gay rights litigation, inviting responses from state and national legislators, as well as citizens via direct legislation (Anderson, 2005, 118n8). I discuss some of these responses below.

¹⁹ Of course, *Bowers* was not the only relevant event at the time: AIDS (including Rock Hudson's revelation that he was gay and had AIDS, which occurred around the same time as the *Bowers* decision) also played a large role in making gays and gay rights a subject of public discussion in the 1980s (Anderson, 2005, 97).

Giving voice, and inviting response: policy-making powers

In addition to consciousness-raising, reflexivity is also generated by the courts' policy-making powers. While policy change is related to consciousness-raising – the intensity of media coverage of litigation can be influenced by anticipated policy change, and policy change can continue to fuel media coverage even after a case is decided – it has other effects. Policy change can give voice to those previously excluded from debates in mainstream electoral politics, and invite responses from other institutions. Policy change can also increase access to the judiciary, and so further enable the judiciary to contribute to the reflexive construction of collective judgment. Although judges' aggressive opposition to litigants' causes might neutralize the courts' potential contributions to voice, the effects of policy-making, like consciousness-raising, do not depend on judges' enthusiastic advocacy of litigants' policies, and, often, even, do not depend on the courts' implementation powers.

Scholars have long recognized the courts as an alternative venue for interest groups seeking policy change. Citing case studies of the NAACP, the Jehovah's Witnesses, the Legal Defense Fund, and the Legal Services Program as examples, Peretti notes that a number of interest groups "have turned to the courts after failing to win their political battles in legislative or executive forums" (1999, 221, 219). And in his study of labor unions, Frymer (2003) shows how activists can achieve their policy goals in the courts after elected officials have proved unresponsive. Despite these and other historical examples, the efficacy of the courts for social change has been debated: Rosenberg's

(1991) argument is paradigmatic in its emphasis on the difficulties the courts face with implementation.

While implementation is of central import for scholars like Peretti (1999), who see the court as another forum for pluralist politics and policy advocacy, implementation is not always necessary for the courts' policy-making powers to provide excluded people with voice, and to have other institutional voices respond. Such reflexivity may occur as elected officials anticipate judicial decisions. Both Pickerill (2004) and Silverstein (2009, 65-70) show that Congress takes into account future Supreme Court decisions in their internal deliberations, as they anticipate judicial review. Silverstein argues not only that the content of decisions are anticipated, but also the legal reasoning. This "juridification" of the lawmaking process includes legislators like members of Congress, but he argues it extends to all political actors with whom the Court engages, including "policy entrepreneurs, opinion leaders, the general public, and individual litigants" (2009, 5). For example, Silverstein traces the recent history of the free exercise clause, arguing that its precedential history "spirals through all three branches of government" (2009, 71).

The specter of a judicial decision can also provoke elected officials to confront an issue that they might have been avoiding – it can provide "political cover" and "shift the spectrum of compromise" (Keck, 2009, 159). For example, in the gay rights movement, Keck has noted a "steady stream of state legislatures has enacted antidiscrimination laws while the SSM conflict has proceeded in the courts" (2009, 159). We might also note that DADT's repeal occurred in the shadow of an ongoing lawsuit. Patton (2007) uncovered a similar anticipatory pattern at the state level. She notes a "rapid diffusion of abortion

policies prior to Court involvement,” with “numerous policies” passed while a case was under consideration (2007, 477).

A judicial decision can also order a legislature to act, and so prompt a response from another institution. For example, in *Baker v. State of Vermont* (1999), the Vermont supreme court found a prohibition on same-sex marriage to be in violation of the state constitution, and they ordered the legislature to provide a correction (Anderson, 2005, 186-7; Eskridge, 2002, 54). Elected officials, it seems, would have preferred to avoid such a risky and divisive issue, but the Vermont court demanded that the legislature engage the question of same-sex marriage in their four remaining months (Eskridge, 2002, 57). The short meeting period of the Vermont legislature meant that officials could either risk a constitutional crisis or engage the issue – the Vermont constitution is relatively difficult to amend, which is one reason Vermont gay rights advocates chose it for a test case (Anderson, 2005, 191-192).

Because of this judicial prompting, the Vermont legislature set up a bipartisan commission to investigate the issue, and, ultimately, voted to approve civil unions among same-sex couples. According to the legislator heading the commission, the commission was a product of “[un]formed preferences” (Eskridge, 2002, 58). The twenty-nine days of investigative hearings held by the commission repeatedly drew large crowds, according to Eskridge (2002, 60). Addressing the issue of his constituents’ opposition to legislation that would provide same-sex couples with benefits equivalent to opposite-sex couples, one legislator asked, “How can people in my village say those things [that ‘marriage or civil unions were special rights’]?” (Eskridge, 2002, 75). He answered his own question: “[T]hese are the same things I said last year. My constituents feel the same way I did

when this issue was put on the table. It wasn't something I wanted to talk about" (Eskridge, 2002, 75).

Judicial decisions can also invite responses to otherwise excluded voices in the form of direct legislation. Take, for example, *Baehr v. Lewin* (1993). In this same-sex marriage lawsuit, Hawaii's supreme court decided strict scrutiny should be applied, and then remanded it to trial court. While *Baehr* was being re-decided in the trial court, the Hawaii legislature addressed the issue, passing a statute declaring marriage to be between a man and a woman, while also setting up the Commission on Sexual Orientation and the Law "to study the legal inequities faced by same-sex couples" (Anderson, 2006, 178). As same-sex marriage was being debated in the legislature, the trial court ruled the Hawaii ban failed to pass even the lowest level of scrutiny, rational review. The decision was nullified by a constitutional referendum defining marriage as between a man and a women. Same-sex marriage remained on the Hawaii political agenda, and the legislature passed the Reciprocal Beneficiaries Act, giving benefits to same-sex couples (Anderson, 2005, 180-1). We can thus see *Baehr* as instigating a reflexive process among and between the courts, legislatures, and direct legislation. In this process, which different commitments were articulated (by both the left and right), and adjusted in light of each other over time.

Baehr also prompted a national process of judgment on the question of same-sex marriage. In 1996 Congress passed the Defense of Marriage Act, in response to concerns that states would have to recognize Hawaiian same-sex marriages, or those of other states who might take a similar route. The issue was taken up in state politics, prompting debates in electoral politics and direct legislation campaigns; by 1998, thirty states had

passed their own “mini-DOMAs” (Anderson, 2005, 181). Yes, *Baehr*, did not prompt a stream of policy victories for the gay rights movement – although it should be noted that its most immediate consequence, the Reciprocal Beneficiaries Act, made Hawaii the most progressive state in terms of benefits to same-sex couples – but in terms of including excluded voices, and inviting responses from other institutions, *Baehr*, it seems, was a success.²⁰ *Baehr* gave voice to gay rights advocates and their opponents, as it put the issue of same-sex marriage onto the national agenda, and the agenda of many states. It also prompted further litigation – the above-mentioned *Baker* (1999) grew directly out of the political organizing sparked by *Baehr* (Anderson, 2005, 179).

In other words, what Rosenberg (1991, 2008) and Klarman (1994, 2004, 2005) condemn as “backlash” against the judiciary, is the judiciary contribution to a collective process of judgment. Voice is given to people excluded from democratic institutions like legislatures, and these institutions are prompted to respond. Note, here, too, that voice is given not just to gay rights advocates, but to their opponents as well. As Greenhouse and Siegel (2011) have suggested, that which travels under the name of “backlash” can also be read as “countermobilization and escalating conflict” (149). Such was the case, they argue, with *Roe v. Wade* (1973). Both mobilization for and against abortion had occurred in waves prior to and after *Roe*; *Roe* was another moment inviting countermobilization (2011, 157).²¹ “Countermobilization is likely to occur only as movement claims begin to

²⁰ And as Keck (2009) notes, the mini-DOMAs *Baehr* appears to have prompted did not, for the most part, change the policy status quo (167-8).

²¹ To be clear, Greenhouse and Siegel argue that *Roe* played a “role in polarization,” but they offer a number of potential roles *Roe* could have played, and place *Roe*’s import in the context of a political struggle that occurred outside the judiciary (e.g., in interest group lobbying and party strategy) (2011, 157). Their argument is against those who place *Roe* as the trigger for later polarization.

elicit public response,” and such public response often occurs “when a movement for constitutional change is gaining in credibility,” writes Siegel (in reference to feminist movements in the 1960s and 1970s) (Siegel, 2006, 1362; Greenhouse and Seigel, 2011, n174). *Baehr* shows how the judiciary can help elicit this public response, and so invite an extended reflexive process of collective judgment.

Or, for example, consider *Lawrence v. Texas* (2003) and *Goodridge v. Department of Public Health* (2003). In *Lawrence*, the Supreme Court reversed *Bowers* and struck the remaining fourteen state laws prohibiting sodomy. At roughly the same time was *Goodridge*, where the state supreme court of Massachusetts declared that same-sex couples had a right to marry. Together, both decisions have been attributed with prompting a series of responses from legislatures and direct legislation: by 2006, 23 states had new prohibitions against same-sex marriage written into their constitutions, prompted, many assume, by *Lawrence* (Keck, 2009, 153; Stoutenborough., Haider-Markel, Allen, 2006). *Lawrence* and *Goodridge*, as viable challenges to the status quo, both appeared to prompt countermobilization and an escalation of conflict that should also be interpreted as a process of collective judgment over time.

Giving voice, and inviting response: the indirect effects of inclusion

Even when a response is not immediately invited, we can still understand the inclusion of excluded voices as sometimes contributing, indirectly, to collective judgment. The judiciary can lower access barriers, and enable excluded voices to be heard in legislatures and courts. For example, consider *Romer v. Evans* (1996), where the Supreme Court struck down a Colorado initiative prohibiting anti-discrimination laws. As

the Court noted in their opinion, Colorado's new constitutional prohibition on discriminatory laws limited one groups' right to equal participation in the legislative process. By overturning the prohibition, the Court enabled excluded voices to be heard in legislative debates. And apparently such debates occurred, as the Colorado state legislature amended the state's employment discrimination law to include sexual orientation in 2007 (Colorado Revised Statutes, 24-34-401, 24-34-402).

Or consider *Lawrence v. Texas* (2003), the 6-3 decision reversing *Bowers* and striking the remaining fourteen state laws prohibiting sodomy. While an important policy victory, and an important moment in the politics of recognition, *Lawrence* was also valuable in making it easier for excluded voices to access the courts. Sodomy statutes had long been a significant barrier to access. Where sodomy was criminalized, it was hard to even discuss arguments against discrimination against gays in other areas, like "employment, military service, housing, public accommodations, immigration, speech and association, custody, adoption, marriage, and the provision of government benefits" (Anderson, 2005, 58).

The D.C. Court of Appeals response to Margaret Padula's employment discrimination suit against the FBI (*Padula v. Webster*, 1987) illustrates the inclusionary value of *Lawrence*. The Court dismissed Padula's suit, writing, "If the [Supreme] Court was unwilling to object to laws that criminalize the behavior that defines a class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious" (Anderson, 2005, 93, citing *Padula*, 103). The overturning of *Bowers* by *Lawrence* made it easier for arguments against discrimination to be heard in other lawsuits, particularly in federal courts (earlier gay rights victories like *Baehr* and *Baker*

relied on state constitutions). These other lawsuits can then invite responses to these previously excluded voices, and so contribute to the construction of collective judgment.

For example, we can understand the federal lawsuit challenging DADT, *Log Cabin Republicans v. United States of America* (2010), to be facilitated by *Lawrence*'s decriminalization of sodomy. In *Log Cabin Republicans*, a California district court judge found that DADT violated the 1st and 5th Amendments, and issued an injunction, prohibiting enforcement of the policy. The DOJ appealed to the Ninth Circuit, who issued a stay on the injunction. In the shadow of this ongoing litigation, Congress debated, and eventually repealed, DADT (Don't Ask, Don't Tell Repeal Act of 2010). The access that *Lawrence* enabled, then, ultimately helped promote this reflexive relationship between the judiciary and Congress.

Limits to inclusion

The requirements of standing are but one barrier that must be overcome for excluded voices to gain access to the public via the judiciary. Significant resources are also needed to sustain the lengthy, repeated litigation that marks large-scale rights change (Epp, 1999). Higher courts that have control over their docket generally only accept cases that have “percolated,” that is, cases that represent “sustained litigation in lower courts,” and have repeatedly requested review (Epp, 1999, 35). In part, this is because the Supreme Court tends to accept cases where there are conflicts in lower courts (Perry, 1994, 120-38). Furthermore, lest cases be merely symbolic, repeated litigation is required in order to “provid[e] clarification and enforcement” (Epp, 1999, 18).

A single case can be pursued by a relatively small number of wealthy benefactors, as in Boies's and Olson's challenge to Proposition 8, *Perry v. Schwarzenegger* (2010). *Perry* is backed by the firm Gibson, Dunn & Crutcher, and funded by a small group of Hollywood elites, such as producer Rob Reiner (Svetvilas, 2010). However, the extended litigation required to pursue even one case like *Perry* is well beyond most people's resources. Consider *Bowers*, for example: while the attorney in *Bowers* pursued the suit without national-level ACLU approval, the case would undoubtedly have been damaged, and possibly have come to a premature end, without the office's eventual support. Successful litigation tends to require either the backing of a few wealthy elites or interest group support – and the latter requires either concentrated wealth or smaller donations from a large base.

Or, the public can contribute resources, in the form of legal aid, fee shifting, and lawsuits brought by government offices like the Equal Employment Opportunity Commission and the Department of Justice (Epp, 1998, 58-64). Such public support for litigation can contribute to collective judgment, as it makes access to the judiciary less dependent on private wealth or interest group support. For example, the now-defunct federally funded legal aid organization, the Legal Services Program, shows how public funding can be used to overcome the financial barriers restricting access to the courts, and so contribute to collective judgment. Prior to the LSP's founding in 1965, the Supreme Court had reviewed 6 poverty cases (Lawrence, 1990, 9). In the 9 years of the LSP's existence, the Court reviewed 119 of its cases (Lawrence, 1990, 9). The LSP provided the poor with access to the courts, and these "newly enfranchised" changed the shape of poverty law (Lawrence, 1990, 112, 150-1).

That said, the direct funding of a legal organization like the LSP depends on the support of other branches. “Unlike most litigation-oriented groups, the LSP was not designed to pursue policy goals rejected elsewhere” notes Lawrence (1990, 118). The LSP operated as part of the larger War on Poverty: the program began with the support of national-level elites, and when it lost that support, it ended (1990, 9, 91-6, 116-9). This is not always the case with all sources of public support, however.

When Congress changes standing rules and fee structures, the access those changes create can exceed Congressional intentions. For example, in the 1960s and 1970s, Congress changed standing rules and fee awards to encourage the enforcement of civil rights (Frymer, 2003, 490-1). “The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the U.S. government have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality,” the drafters of the Civil Rights Attorney's Fees Award Act of 1976 explained (Frymer, 2003, 491).

However, many of the changes in the 1960s and 1970s also gave access to labor groups, a consequence that Congress had not intended (2003, 491-2). Changes to rules like standing and fee structures – which, collectively, we can think of as “private enforcement regimes” – not only gives Congress imperfect control over access, these changes also tend to endure, surviving the Congress that creates them (Farhang, 2008, 822, 829). In these ways – the endurance of changes to enforcement regimes, and the inability of Congress to control access through such regimes – some public forms of support for litigation do not require the direct support of elected officials. The discretion

given to the Court can enable the inclusion of otherwise excluded voices, and introduce an element of reflexivity into the larger institutions system, as it did with the labor cases Frymer studied (2003).

The inclusion of excluded voices has its own distinct value for collective judgment, one that does not require reflexivity. The inclusion of diverse voices allows collective judgment to take into account the evidential contributions of situated knowledge. Our own judgments are all limited, to some degree, by our background assumptions, based on our own unique experiences. Incorporating diverse perspectives thus has the potential to bring new information to bear on old questions. Incorporating a diversity of individual perspectives can generate more evidence to support (or challenge) existing judgments, and generate new ones. This epistemological argument for diversity is an old one: it is central to Mill's argument in *On Liberty* for the value of free speech and experiments in living, for instance. More recent incarnations include arguments for the value of a feminist research agenda (Anderson, 2004; Anderson, 2006b), and the value of "dissent" (Sunstein, 2003). That said, we can also think of adjudication as well-positioned to contribute particular types of evidence to collective judgment.

Consequences and lived experience, including emotions

Because adjudication requires live controversies and the participation of affected parties, it is particularly sensitive to the consequences of existent laws, and the evidence of lived experiences. This concern with observed consequences can be contrasted with deliberative judgment not so bound: in comparison, the judgment of deliberation can seem like "a kind of thought experiment" (Anderson, 2006b, 14). For example, consider

again the LSP. As I noted above, the LSP played an important role in changing the structure of U.S. poverty law. The LSP was particularly attentive to the consequences of existent law on lived experience, so it serves as a dramatic – if atypical – example of how the judiciary can introduce the consequences of existent laws to the public in a reflexive process.²²

Unlike most interest groups, the LSP was highly decentralized, and did not organize litigation strategy in a top-down manner (Lawrence, 1990, 28-9, 38-9, 40-6). Nor was the LSP's work oriented by pre-existent policy goals: instead, its litigation strategy grew out of client concerns (Lawrence, 1990, 28-9, 38-9, 43-6). The result was a “great diversity in cases... reflecting the diverse concerns of the Program's clients” (Lawrence, 1990, 58). And, unlike the legal aid services that had preceded (or followed) it, the LSP saw appellate advocacy as a key component of its service (Lawrence, 1990, 15, 31). This combination ultimately created a “heterogenous LSP Supreme Court docket” (Lawrence, 1990, 58).

The LSP had great success in accessing the Supreme Court. Its success rate hovered around 72%, a rate comparable only to the DOJ (Lawrence, 1990, 86; Clayton, 1992, 68-9). Other work suggests that the typical interest group has a success rate of around 10%, while the rate for individuals is closer to 3% (Lawrence, 1990, 75, citing Perry's dissertation, now in Perry, 1994, 352, 358). The success of the LSP was very much a function of its clients' prior exclusion, as these “newly enfranchised litigants

²² Note, though, that the LSP's distinctness does not stem from atypical judicial procedures; rather, the LSP's distinctness derives from its instigating a sudden and dramatic increase in the inclusion of excluded voices, as well as the LSP's unique emphasis on both client concerns, and appellate litigation. As I noted above, prior to the LSP, the Court had only taken 6 poverty cases.

present[ed] new opportunities for decision” (Lawrence, 1990, 112, 153). This is not to say that the LSP’s success rate was entirely a function of newly enfranchised litigants. The LSP’s success also required a sympathetic Court, as well as a sympathetic legal framework (Lawrence, 1990, 112). As I noted above, we can trace both these sympathies to the national elites of the time. That said, courts can only review the cases with which they are presented, so judicial policy-making is necessarily constrained by the suits that are filed (Lawrence, 1990, 3-5). And, as Lawrence points out, “[o]nce a case goes to court, the success of litigants’ arguments often depend on their ability to relate their personal interest at stake in the litigation to a larger common purpose as defined in statutes and the constitution” (1990, 153).

In the case of the LSP, the courts largely acted as an avenue for litigants to communicate conflicts in law, as local officials and bureaucracies implemented many policies that (ultimately) the courts found to be inconsistent with prior legal commitments (Lawrence, 1990, 94, 153). The LSP cases made these previous inconsistencies visible at the national level because the LSP gave voice to the experienced consequences of implementation. These contributions to collective judgment did not remain sequestered in the judiciary. The actions of the LSP can be interpreted as introducing a reflexive element into the system.

Congress repeatedly reviewed the contributions of the LSP over the course of its history, as its opponents – driven, in part by resistance at the state and local level – objected to the LSP’s suits against government agencies (Lawrence, 1990, 33, 35-6; 116-7). In 1967 and 1969, Congress expressed “limited” support for the LSP. Debate over the LSP’s proper role, and concomitant review of its activities, continued until its

replacement by the Legal Services Corporation, in 1974 (Lawrence, 1990, 116-7).

Lawrence, for one, credits the sustained litigation of the LSP, and the conversations it prompted, with helping to shift (some of) the public's understanding of welfare. Even though the Court declined to declare welfare a constitutional right, cases like *Goldberg v Kelly* (1970), which required states to provide a hearing before terminating a recipient's welfare, and *Shapiro v. Thompson* (1969), which prohibited states from limiting welfare to those who had resided in state for a proscribed amount of time, helped many see welfare not as a privilege, but a right, argues Lawrence (1990, 118).

It is worth nothing that locating the LSP's contributions in the indirect construction of public judgment, rather than the court's direct reform of poverty policy, also makes certain criticisms of the LSP less powerful. For example, Silverstein argues that the LSP's founders, a couple devoted to fighting poverty, succumbed to "law's allure" (2009, 109). Citing the failure of the LSP to force the Court to recognize welfare as a legal right, Silverstein claims that "a near-exclusive reliance on a judicial strategy never came close to forcing the government to do what politicians and public opinion did not support"; instead of working against electoral politics and public, he argues that the LSP should have worked with them (2009, 109). Yet such a dismissal of the LSP is based on a flattening of the concept of public opinion – as Lawrence's work shows, different institutional sites articulated different concerns.²³ To say that the LSP simply ignored politicians and public opinion also mischaracterizes the complexity of interbranch

²³ Silverstein's argument also ignores how the LSP did, in fact, alter the status quo. Like Rosenberg's and Klarman's alarmist charges of backlash, Silverstein's argument rests on the implicit but unproven assumption that policy change through legislatures was possible, and that such change would not have provoked a counter-mobilization similar to that provoked by the courts (see footnote 4).

relations, and falsely assumes that litigation is a unidirectional process, one that always operates independently of any significant public support: as Silverstein himself notes, the LSP began with the support of national elites, and it ended when that support was withdrawn.

The judiciary's attentiveness to the consequences of the lived experience of collective commitments has also been highlighted by feminist legal studies. This claim might initially appear perverse: classic works in feminist legal studies, like McKinnon (1990) and Crenshaw (1991), criticize the law for its false neutrality, and inattentiveness to the particularity of lived experiences. However, it's worth noting that both of these critiques – one of which prompted a whole subset of scholarship devoted to intersectional analyses, a field itself devoted to the consequences of differences in lived experience – grew out of direct experience with litigation. We can locate McKinnon and Crenshaw within a movement that used women's particular experiences under law to help alter collective judgment on a number of issues. For example, in her famous critique of sex equality law, McKinnon claims that women's recently acquired access to the judiciary was the catalyst for improvements in assault, rape, abortion, family law, and tort law (1991, 1294-5).

We can read McKinnon as arguing that it is not the inherent structure of law, but the exclusion of women from the judiciary that helped produce a legal order with this false neutrality. After cataloguing the many different ways her litigation has shown how women can experience the law differently, McKinnon concluded her essay with a quintessentially Millian call to “fac[e] that we cannot know what women not unequal as women would want, how sexuality would be constructed, how law would relate to

society, what form the state would take, or even if there would be one” (1990, 1281). Because of our epistemological fallibility, good judgment rests on more than speculation and, even, deliberation: the judiciary can supplement collective judgment by bringing the diverse consequences of collective commitments to public attention. Of course, as McKinnon also notes, this requires that diverse voices have access to the judiciary, and, as I explained earlier, there are many constraints on such access in the U.S.

A second aspect of the adjudicatory process that promotes better collective judgment is related to the first: the required participation of affected parties not only encourages judgments that consider actual consequences, it also introduces an affective element that can prompt reflection. As those who study social movements have noted, litigation is sometimes strategically deployed for its dramatic value (McCann, 1994, 58-74; Zackin, 2008, 385-7).²⁴ As I argued in Chapter 2, following Anderson (1991, 2004, 2006a), we can understand emotional experiences as evidence for value judgments. The affective element introduced by the involvement of affected parties can thus provide more evidence for our judgments. Anderson also explains how emotional experiences can act as catalysts to note and reflect upon conflicts in our moral theories, principles, and particular judgments (1991, 26).

Consider, for example, recent litigation on same-sex marriage litigation. Nussbaum (2010) argues that opposition to same-sex marriage is, ultimately, grounded in disgust of gays. As I also explained in Chapter 2, Anderson points out that, for emotions to serve as evidence, they must be defeasible (Anderson, 2004, 9-10). In other words,

²⁴ In his summary of a lengthy section on “Litigation, Publicity, and Mobilization,” McCann (1994) lists a central goal of movement litigation as “dramatiz[ing] key issues” (74). Zackin (2008) has a more extended discussion of the uses of “dramatization” (385-7).

emotions must be not held dogmatically (Anderson, 2004, 9-10). From this perspective, then, it is okay, for example, to feel disgust (it can prompt reflection), but such disgust cannot remain in an indefeasible form if it is to contribute to good judgment. We can understand the legal order as requiring emotions to be voiced in a defeasible form: adjudication requires that disgust (or other emotions) be translated into reasons. And, furthermore, the legal order accepts only certain reasons as valid. Religious reasons are not accepted: the Establishment Clause requires that the state not favor any sect. When creating classifications, the Equal Protection requires that a classification be, at minimum, rationally related to a legitimate state interest; this excludes animus towards a group (e.g., the opinion in *Romer*). Rather than interpreting adjudication's reason-giving process as properly excluding irrational emotions (as Nussbaum does, 2010), we should instead understand the legal order as enabling the inclusion of emotions by making emotions defeasible.²⁵

In some cases, when the evidence conflicts with commitments to certain principles – like not accepting animus as sufficient justification for the unequal treatment of groups, and the separation of church and state – we might, on due reflection, adjust the evidence. If we are disgusted, we might become less so. Or, we might adjust the

²⁵ Of course, this reading of Anderson is somewhat at cross-purposes with her intentions. But it is still consistent with two parts of her argument – that emotional experiences can prompt reflection, and that for emotions to serve as evidence for judgments they must be defeasible. Anderson's example of how we know emotions can be defensible is a conversation where reasons are given and reflected upon. Granted, her point with that conversation is to show that emotions are defeasible, but it nonetheless shows how, to use emotions as evidence, emotions have to be integrated with our other commitments in a reflexive manner that involves thinking through what reasons we might have to express a particular or emotion or emotions. That same point is apparent in other examples where she talks about the use of emotions – in her discussion of Mill, for example, Anderson emphasizes that he is able to use his own emotional experience only because of his great capacity for reflection and his highly ordered commitments (1991, 25).

principles: we might find that the separation of church and state is as not as important to us as it once was, for example. None of this is to argue that this reflexivity occurs in a vacuum – how we end up adjusting our commitments (if we do) would seem to depend on how strongly we are attached to any particular commitment, and those attachments are likely influenced by experiences outside of governing institutions.

The judiciary has particular value for judgment in that it allows us to translate our lived experiences into evidence that can then be put in conversation with a relatively ordered set of commitments, as expressed in the legal order. In inviting responses to the constitutional order, including emotional ones, we can understand the judiciary to be building in a capacity for collective judgment at the level of institutions.

Conclusion

In this chapter, I showed how the judiciary encourages reflexive adjustment among commitments in light of others. The judiciary contributes to this collective process of judgment by including otherwise excluded voices, looking to the diverse consequences of collectively held commitments as expressed in policy, and incorporating emotional experience as evidence. All this improves collective judgment, in that it makes it more justifiable. The judiciary's contributions are a function of its relationships to other institutions, as well as the particular character of the adjudication process. That said, the judiciary's contributions are not unlimited; in this chapter I also outlined constraints on access to the judiciary, constraints that limits its contributions to collective judgment.

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Chapter 4

Judgment and Direct Legislation

The use and import of direct legislation in American politics is rising (see e.g., Lupia and Matsusaka, 2004; Donovan, Tolbert, and Smith, 2009). However, democratic theorists have largely overlooked the institution (Chambers, 2009). Direct legislation falls short of deliberative democrats' ideal of relatively symmetric power relations. Rhetoric, not reason, is understood as the currency of mass democracy. And actual currency is a concern, too: wealthy interests groups are known to dump massive amounts of money into direct legislation campaigns, furthering inequalities of voice. But one need not be a deliberative democrat to eschew the study of direct legislation. A consequentialist approach might have this effect as well: initiatives appear to have bankrupted California by limiting taxes and increasing spending, and in a number of states, citizens have used direct legislation to pass discriminatory laws.

While we are right to have worries with regards to direct legislation, I argue the above worries are the wrong worries. The standard criticisms of direct democracy – that it hurts minorities, bankrupts state budgets, relies on incompetent voters, and is susceptible to corporate influence – are complicated in the empirical literature. There is little evidence to suggest direct legislation is more harmful in these areas than

legislatures.

That said, the empirical literature is poorly positioned to provide a comprehensive defense of the institution. Empiricists largely appeal to a standard of congruence between the people's preferences and policy outcomes: to the degree that governance results in median-reverting policy outcomes, most empiricists claim democracy has been achieved. Yet the congruence standard is problematic for two reasons. For one, it can be used to justify an appeal to the "people's interest," a standard long challenged by proponents of democracy. For another, it relies on the assumption that the people's preferences are not constructed by political processes and institutions. The congruence standard's reliance on this assumption of exogenous preferences has been challenged by both normative and empirical work (Disch, 2011).

In place of the standard of congruence, I develop a judgment-based model, and apply the model to the evaluation of direct legislation. Democratic theorists are turning to processes of citizen judgment formation to ground theories of legitimacy, placing the formation and circulation of judgment on par with, or above, decisions made in formal governing institutions. Still, the evaluative standards normative theorists have so far developed – like promotion of contention – are too capacious to replace the congruence standard. Part of the difficulty lies with the concept of judgment. If we define judgment as a mental activity, an activity that need not determine an observable act, it is not clear how it could be measured.

I approach this problem by studying the institutional conditions that enable and structure citizen judgment. I argue we should understand the creation of such enabling conditions as one feature by which we might evaluate democratic institutions. Institutions

affect citizen judgment through the construction of an inter-institutional agenda: citizen judgment, public opinion work shows, is not formed in institutional isolation. For example, when citizens judge an electoral candidate, their judgments are informed by the salient issues of the time, not only by the issues raised in the candidate's campaign. Following public opinion work on the conditions that foster citizen judgment, I argue we should worry when institutions narrow the inter-institutional agenda to a single issue, and seek out institutional designs that contribute to a diverse inter-institutional agenda.

According to this judgment-based standard, direct legislation is more worrisome than the empirical literature concludes, but less worrisome than normative theorists might assume. In certain cases, direct legislation contributes to citizen judgment by diversifying the inter-institutional agenda; in other cases, direct legislation hinders citizen judgment by narrowing the inter-institutional agenda. A judgment-based model affirms some institutional alterations recommended by the congruence standard, like campaign finance reform, but it also suggests new ones, like staggering ballot initiatives and electoral campaigns.

The mythology of direct legislation

Direct legislation is defined as citizens' direct vote on existent or proposed law. In the U.S., there are two sorts of institutions of direct legislation, initiatives and referendums. Initiatives are direct votes on laws proposed by citizens, and referendums are direct votes on existent laws, or laws proposed by legislatures (Boehmke, 2005, 15; Gerber, 1996, 264). Twenty-four states have legislative initiatives, and eighteen states have constitutional initiatives (Boehmke, 2005, 15, 16). Since the late 1970s, direct

legislation's use has steadily risen (Matsusaka, 2004; Donovan, Tolbert, and Smith, 2009). Direct legislation undoubtedly plays a significant role in American politics.

While there have been normative debates over direct legislation since the institution was first proposed, the recent rise in direct legislation's influence, and developments in formal theory and public opinion scholarship, have been accompanied by new debates over the institutions' normative value. On the questions of minority-harming legislation, poor budgeting, corporate influence, and voter competence, there is little evidence to indicate that direct legislation is more harmful than the legislature.

Minority-harming legislation. Direct legislation appears to epitomize the unbridled exercise of majority rule, particularly when direct legislation amends constitutions. Some of the most high profile examples of direct legislation are easily interpreted as majority tyranny: limitations on racial minorities' access to housing and public accommodation; delays placed on school desegregation; discrimination against citizens with AIDS; English language mandates; the removal of affirmative action programs (the value to minorities which is, of course, debated); restrictions on the rights of illegal immigrants and aliens, and their access to state resources; and restrictions on gay rights and same-sex marriage (for a discussion of the history of some of these issues, see Gamble, 1997).

But it is not clear how often direct legislation actually damages minorities, nor is it clear that direct legislation is more damaging than other institutions. There is evidence that the most successful direct legislation – in terms of its approval by voters – is legislation that restricts minority rights. In a study of direct legislation on civil rights, covering the period of 1959 to 1993, Gamble (1997) found that initiatives restricting

minority rights experienced a much higher success rate (78%) than the average success rate (33%). Yet, empirical work also suggests that the vast majority of initiatives do not address minority rights (Gamble, 1997; Hajnal, Gerber, and Louch, 2002).

When direct legislation harmful to minorities does pass, the actual harm experienced by minorities likely varies widely, depending not only on the content of the law, but also the law's implementation. Direct legislation faces many implementation problems. Legislatures often seem willing to overturn direct legislation (Smith, 2003). And a number of statutes ended up in state courts, delaying or preventing their implementation. Consider California: over a twenty-year period (1960-1980), state and Federal courts declared all but two initiatives in California wholly or partially unconstitutional (Magleby, 1994, 40). The most carefully documented problem with the implementation of direct legislation is the lack of oversight, and the delegation of the laws' execution to bureaucrats, legislatures, and other governing officials.

Direct legislation is typically sponsored by groups that form solely to support an initiative or referendum, and then disband after the electorate votes (Gerber, Lupia, and McCubbins, 2004; Lupia and Matsusaka, 2004). Because implementation is then delegated (often to multiple actors), and the group supporting the law has often dissolved, some degree of noncompliance is the norm, rather than the exception (Gerber, Lupia, and McCubbins, 2004). Furthermore, the elected officials charged with the implementation of direct legislation are usually officials that previously blocked the legislation – direct legislation is costly and thus not the first avenue for policy reform, so those laws that are directly legislated are typically laws that would not be passed by the legislature (Gerber, 1996, 1999). This means that the sorts of laws most likely to be passed as a result of

direct legislation are also the sorts of laws least likely to be implemented and enforced (Gerber, Lupia, and McCubbins, 2004).

For example, consider California's 1986 "English Only" initiative, which passed with 73% of the electorate's vote, "made English the state's official language and required state officials to 'preserve and strengthen it'" (California Secretary of State 1996, in Gerber, Lupia, and McCubbins, 2004, 43). A number of governing officials opposed the law and did little to enforce it. When a complaint was filed, the Attorney General "argued that Proposition 63 required only that official publications be made available in English, not that they be offered in English *only*" (Gerber, Lupia, and McCubbins, 2004, 44). So while direct legislation does damage minority interests, it is not clear that the institution does more damage than legislatures, particularly when direct legislation's implementation problem is taken into account.

Poor budgeting. Common knowledge might point to direct legislation's perverse effects on the state budget, but the supposed "Californication" of state budgets has little empirical support (Matsusaka, 2005b). Since California has one of the oldest and oft-employed institutions of direct legislation, and (uniquely among the states) prevents the legislature from altering initiative budgeting decisions, it would seem that if any state's budget is likely to suffer from direct legislation, it would be California's. However, Matsusaka (2005b) found that only a small percentage of California's budget is actually spent on projects that would not have, without initiatives, been funded, and that restraints on taxes did not significantly constrain legislators' ability to generate income.

Corporate influence. Another longstanding concern with direct legislation is the role of corporate interests. Progressive and Populist politicians envisioned direct

legislation as a tool for countering the influence of corporate interests, but it quickly became apparent that they would exert significant influence (Gerber, 1999; Smith and Tolbert, 2004). While corporate interests undoubtedly use direct legislation to further their interests, it is not clear that corporate interests profit more from direct legislation than they do from legislatures.

Corporate interests have difficulty passing direct legislation because of their particular set of resources (Gerber, 1999), and because of the way voters vote (Lupia and Matsusaka, 2004). Business groups tend to be less credible, and have fewer volunteers, both of which are valuable resources when trying to pass a proposition (Gerber, 1999). Voters tend to vote “no” on direct legislation when it is not clear that new legislation is preferable to the status quo (Bowler and Donovan, 1998), so when citizens are confused by a ballot issue, or feel that they are lacking credible endorsements – which is more likely when business interests are attempting to pass direct legislation – voters are likely to reject the proposal (Lupia and Matsusaka, 2004). While business groups do have success opposing direct legislation, business groups say (and formal theory suggests) that the main reason they involve themselves with direct legislation is to send a signal to the legislature (Gerber, 1999).

Unlike business groups, citizen groups have some success in passing direct legislation (Gerber, 1999; Boehmke, 2005). Broad-based citizen interests groups appear to be the most successful, as they have the resources most needed in direct legislation: a large number of volunteers, a large amount of money (Boehmke, 2005), and greater credibility with voters (Gerber, 1999). Citizen groups are most successful when there is already widespread support for their proposal – citizen groups usually do not have

enough money to alter the status quo (Lupia and Matsusaka, 2004). In short, direct legislation offers broad-based citizen groups a venue for policy change, and does not allow corporate groups to “buy” new legislation at the ballot box.

Voter competence. Again, the debates over whether voters are sufficiently capable of making legislative decisions dates back to direct legislation’s origins in the Progressive Era (Smith and Tolbert, 2004). Citizens often appear woefully uninformed (e.g., Campbell, Converse, Miller, and Stokes, 1960; Zaller, 1992), susceptible to the influence of business interests, unable to decipher ballots that are, often, quite complex, and unable to lean on the cues provide by elections (e.g, partisanship, the history of a candidate) (see Magleby, 1984, 1994, or Cronin, 1989, for a good overview of these problems).

However, empirical scholarship has shown that voters are able to make knowledgeable decisions under many conditions, including campaigns involving well-funded business interests and complex ballots (e.g., Lupia, 1992; Lupia, 1994; Lupia and McCubbins, 1998; Gerber and Lupia, 1999). Citizens are able to use “informational shortcuts,” and learn from reliable endorsements (Lupia, 1992; Lupia, 1994; Lupia and McCubbins, 1998). For example, in the 1988 California insurance campaigns – where insurance lobbyists spent over \$65 million, and ballot propositions were both complex and confusing – Lupia (1994) demonstrated that shortcuts allowed less informed voters to emulated similarly situated, informed voters. And, as noted above, citizens do appear to vote “no” when they do not understand a proposition (Bowler and Donovan, 1998).

Not only are problems with voter competence overstated, empirical research suggests direct legislation has slight “educative effects,” increasing voter turnout, particularly in low salience elections such as midterms, and among independents (Tolbert

and Smith, 2005; Donovan, Tolbert, and Smith, 2009); increasing confidence in government (Tolbert and Smith, 2004); and increasing political knowledge, through political campaigning (Tolbert and Smith, 2004), and direct legislation campaigns explicitly connected to electoral races (Tolbert and Smith, 2006).

However, just because direct legislation appears no worse than legislatures in the areas of minority-harming legislation, poor budgeting, corporate influence, and voter competence, it does not follow that direct legislation is democratic. Empirical scholars largely employ the standard of congruence to evaluate direct legislation.

The standard of congruence

The empirical literature looks for congruence between the people's preferences and policy outcomes: to the degree that policy outcomes are congruent with the people's preferences, democracy is said to have been achieved. According to this standard, direct legislation contributes to democracy. Empirical work has shown direct legislation to be a “‘median-reverting’ institution” (Lupia and Matsusaka, 2004). Direct legislation alters the behavior of the legislature (usually indirectly): threats of initiative can push the legislature towards the preferences of the median-voter (Gerber, 1999). The presence of initiatives has also been shown to increase the amount of legislation (Randolph, 2010), an observation consistent with the theory that direct legislation brings the legislature closer in line to the median voter (Matsusaka and McCarty, 2001).

The presence of direct legislation has also changed how interest groups lobby the legislature: as groups’ resources shift in response to the additional policy avenue of direct legislation, interests groups engage in more outside lobbying (Boehmke, 2005). (Outside

lobbying occurs when lobbyists use public opinion as a tool to influence legislators – so, for example, lobbyists might directly shape public opinion, or they might threaten legislators with grassroots pressure, Kollman, 1998). In states with robust direct legislation, the legislature is more influenced by the median voter (Boehmke, 2005).

The particular institutional design of direct legislation – most notably the absence of party organization, which can cause legislators to deviate from the median voter – provides an alternative venue for policy advocates (Gerber, 1996). This suggests direct legislation can offer legislation congruent with the median voter's preferences that, without direct legislation, would not have become law. Empirical work supports this theory: direct legislation does create policies the legislature would, on its own, not enact. For example, 22 out of the 24 states with initiatives have term limit laws for legislators, while only 2 of the 26 states without initiatives do (Matsusaka, 2005a). And, initiative states are more likely to have lower salaries for officials holding higher office than non-initiative states (Matsusaka, 2005a). Initiatives also seem to produce more socially conservative policies (Gerber, 1999; Matsusaka, 2004; Bowler and Donovan, 2004), and alter fiscal policy, reducing both taxes and spending (Matsusaka, 2004). These policy trends might well reflect the preferences of a median voter positioned to the right of the legislature, as these trends in spending are not reflected in the direct legislation of the first half of the 20th century, or, recently, in more urban areas (Lupia and Matsusaka, 2004).

Because direct legislation disciplines the legislature and offers alternative legislation when elected officials stray from the median voter's preferences, direct legislation has democratic value according to the standard of congruence. But the congruence standard is problematic from both empirical and normative perspectives.

Challenges to the congruence standard

The congruence standard is derived from a widespread model of democratic representation which some call the “mandate model” (Disch, 2011; Rosanvallon, 2008), others the “institutional” model (Urbinati, 2006), and (many) the principal-agent model. According to this notion, the people authorize officials – generally through elections – to govern in their interests. There are potentially two distinct standards for evaluating congruence in this model. One standard is the people’s will (what the people decide they want), and the other is people’s interest (what is best for the people).

The latter standard, that of the people’s interests, faces substantial democratic difficulties. It allows for the dismissal of citizen voice – citizens can be said not to “know” their own interest, or the interest of the whole. Perhaps the most infamous application of this standard is Edmund Burke’s theory of virtual representation. Burke believed representatives should listen to their constituents’ opinions. Yet, argued Burke, to think that such opinions are “authoritative instructions” or “mandates” is to misunderstand the job of a representative and the nature of the representative assembly, which is to deliberate among themselves, and to look to “*one* interest, that of the whole” ([1774], 1856). Considering its easy dismissal of citizen voice, it is not surprising that virtual representation has a history of justifying exclusion – it was used to justify women’s lack of vote, for instance (Urbinati, 2006, 151).

More contemporary critiques of the standard of the people’s interest have feared “technocracy.” Consider, for example, Habermas’s critique of the scientization of politics and public opinion (1970). Insofar that the question of the people’s interests becomes a scientifically soluble problem – simply a question of research, knowledge, and

application – a “technocratic” regime is justifiable. However, as Habermas (following Weber) argues, such a regime is impossible: knowledge, particularly political knowledge, is never value-neutral. The technocratic model, then, is no different from a model in which officials simply choose “between competing value orders and convictions” (1970, 63).

While concerns with references to the people’s interests are longstanding, concerns with the former standard of congruence – that of the people’s will – are on the rise. The people’s will, the supposed device for the authorization of elected officials, appears to be at least partially a product of the authorization process.²⁶ Political psychologists conceive preferences as endogenous to politics (e.g., Bartels, 2003); legislative scholars model representation as a dynamic, also with endogenous preferences (e.g., Gerber and Jackson, 1993, Stimson, Mackuen, and Erikson, 1995); public opinion scholars study how frames construct preferences (e.g., Druckman, 2004); and historical institutionalists examine how institutions create preferences (e.g. Thelen, 2003).

On the normative side, feminist theorists have long challenged naturalizing categories of identity and interest, instead seeing them as constructs of political processes. For instance “women” is understood not as a prepolitical identity, but a construct useful for political organizing (Zerilli, 2005), or a “perspective” created by political processes over time (Young, 2000). Similarly, those working in the post-structuralist tradition have understood meaning and coherence – including “the people” of a democracy – as constructs of practices (see Näsström, 2006, for an overview). This

²⁶ For a detailed explanation of these concerns, see Disch (2011). Disch traces this difficulty to Pitkin’s influential work on representation (1967).

undermining of the pre-political people's will removes the "bedrock" upon which the empirical evaluations of direct legislation rely: if political processes construct the people's will, then the standard of congruence between preferences and policy outcome is in inadequate indicator of democratic representation (Disch, 2011).

In sum, there are two problems with the standard of congruence. One is that congruence with the people's interests is not, on its own, an obviously democratic measure. The second is with the unidirectional framework of authorization underlying the congruence standard: if political processes constitute the political decisions citizens make, then congruence's ability to indicate authorization (and the authorization process itself) is suspect. Because of these problems, the standard of congruence offers an incomplete defense of direct legislation's democratic character.

If empiricists are aware of (at least) some of the problems with the standard of congruence, one might wonder why it continues to be used. For one, there is no clear alternative. "The normative issues raised by endogenous preferences are larger and less tractable" than the empirical issues, concluded two scholars in a response typical of their field (Gerber and Jackson, 1993, p654). Many are aware of the difficulty, but (perhaps feeling such a problem is the domain of normative theorists) they usually simply note the issue and move on. Furthermore, the "mandate" or "institutional" model is notoriously difficult to avoid. While scholars have acknowledged its shortcomings, they nonetheless tend to revert to its normative framework (Disch, 2011).

A judgment-based evaluation

The normative standard of a judgment-based model is citizens' judgment of governance, and the subject of evaluation is institutional design – whether institutions enable citizens' judgment of governance. In certain cases, direct legislation enables citizen judgment on issues of governance that, without the institution, citizens would not have had the opportunity to judge.

Policy advocates typically turn to direct legislation only after failing to make progress in other venues (because direct legislation is so costly) (Gerber, 1999). Not all issues have equal access to the public's judgment via direct legislation: reaching the public requires money, people, and credibility, which is why broad-based interest groups have the most success passing propositions (Gerber, 1999; Lupia and Matsusaka, 2004; Boehmke, 2005). In short, direct legislation allows the public to judge issues that both failed to reach the public via other venues – like the state legislature – and that are supported by broad-based interest groups.

For example, consider California's 1988 insurance initiative campaigns. In the 1980's, Californians saw their auto insurance premiums escalate. The insurance companies blamed the lawyers, whose excessive litigiousness, they argued, caused the increase; the lawyers in turn blamed the auto insurance companies, arguing that lawsuits allowed citizens some control over the powerful insurance industry; and consumer activists pushed for lower rates and greater oversight of the industry (Lupia, 1994, 64-5). For five years, discussions for reform failed to proceed past legislative committee's deliberations, deliberations that were dominated by the insurance and attorney interests (Lupia, 1994).

In response to this legislative stalemate, and their own exclusion from the legislative process, consumer activists announced they would put a reform proposition on the 1988 ballot (Lupia, 1994, 64, n13). The auto insurance industry and attorneys' lobby shortly followed the consumer activists' proposal with their own propositions. Over \$82 million was spent over the course of the campaign, with the insurance lobby spending approximately \$65 million; the attorneys, \$15 million; and consumer activists, a little under \$2 million. Despite the complexity of the issue, an ambiguous ballot, and the high amount of money spent on this campaign by the insurance industry, voters approved the initiative offered by consumer activists (albeit by a slim margin), and rejected those initiatives offered by the insurance industry and the attorneys (Lupia, 1994).

The insurance industry case is typical of direct legislation's potential contributions. The "mythology" of direct legislation – that corporate interests determine outcomes, and that voters are confused by complex issues and ballots – proved false. Without direct legislation, citizens would not have had the opportunity to judge the issue of insurance reforms. Furthermore, it was not judgment on simply any issue that direct legislation enabled – insurance reform was pushed by broad-based interest groups with the resources to conduct a direct legislation campaign.

To be clear, a judgment-based model does not understand broad-based interest group support to be an indicator of democracy. This is different from the congruence standard, which understands broad-based interest group support to indicate an issue's potential alignment with the median voter's preferences. According to a judgment-based model, the value of direct legislation lies in the enablement of citizen judgment on issues that otherwise would not have come before the public. That *only* issues backed by broad-

based interest groups become objects of citizen judgment indicates the *limits* of direct legislation's contributions. So, for very different reasons, the congruence standard and the judgment-based model would agree that the insurance reform case was an example of direct legislation contributing to a democratic system. Such agreement is not the case with all instances of direct legislation. Consider, for example, California's Proposition 187.

Proposition 187

Proposition 187 was a 1994 initiative targeting illegal immigrant's access to public resources. Known as the "Save our State" initiative, it removed access to a variety of public services, including public education and non-emergency health care. The initiative also required local officials to report suspected illegal immigrants to the INS. In the 1994 midterms, SOS passed with a remarkable level of voter support (59% for, 41% against) (Nicholson, 2005, 97).

According to the standard of congruence, and the "mandate" or "institutional" model of representation underlying it, there are no obvious problems with SOS and its passage. The standard of congruence is concerned with voters' ability to express their preferences – either voters should be well-informed, or they should be able to rely on available cues. In the case of SOS, it would be hard to argue that voters lacked either information or cues. Ninety-one percent of voters were aware of the proposition, an incredibly high percentage (Nicholson, 2003, 406; Nicholson, 2005, 97), and forty percent of voters said the proposition was the most important issue in the midterms (despite their being both a gubernatorial race and U.S. senate race that year) (Lubenow,

1995, 124; Nicholson, 2005, 97). The ballot was not particularly complex, and there were plenty of reliable cues by endorsers: by the date of the vote, high-profile candidates on both sides of the aisle had either endorsed or rejected SOS. Furthermore, the fifty-nine percent passage rate reflected opinion polls over the course of the campaign (Nicholson, 2005, 97). While such consistency in opinion is not proof of awareness and understanding, it is not consistent with a confusing campaign.

Granted, one could argue SOS was a violation of minority rights. But such threats to minorities are, as I noted above, relatively rare, and it is not clear that direct legislation is worse in this respect than other democratic institutions, like legislatures. Scholars employing the “mandate” or “institutional” model have argued that these occasional violations are not indicative of a democratic deficiency, but of the value of an authoritative, rights-protecting constitution (Lupia and Matsusaka, 2004). Here, the constitution seems to have played precisely that role: most of the proposition was declared unconstitutional by a federal court. Although the state appealed, an agreement was eventually reached whereby all of SOS – with the exception of two minor provisions penalizing the production of false documents – were voided (McDonnell, 1999; Nieves, 1999).

From the perspective of the standard of congruence, then, direct legislation played its democratic role as a median-reverting institution. Laws barring illegal immigrants from public benefits made little progress in the legislature, and the people were able to express their will directly with SOS. And when the will of the people violated minority rights, as it arguably did with SOS, the constitution prevented the law’s implementation.

However, SOS is problematic from a judgment-based perspective. The SOS campaign did not give citizens the opportunity to judge an issue that, without the initiative, they would otherwise not have judged. The central institutional feature of direct legislation that allows it to be an alternative venue for policy advocates is its absence of party organization (Gerber, 1999). However, parties played an important role in the SOS campaign. When the interest group proposing SOS ran out of money, the Republican Party stepped in, and funded the campaign (Nicholson, 2005, 96). Furthermore, SOS was a central feature of the Republican gubernatorial campaign. SOS, then, became an issue not because it failed to gain traction in other policy arenas, but because Republicans recognized that SOS could be used as a wedge issue to influence concurrent campaigns (Nicholson, 2005).

The SOS case is not only an example of direct legislation *not* contributing to a democratic system, it also indicates problems direct legislation can introduce. In the SOS case, direct legislation was used to *narrow* the issues citizen judged. Public opinion work on voting helps us here. Integrating widely accepted literatures on priming, partisan stereotypes, and spillover effects, Nicholson (2005) shows that voters do not judge electoral or initiative issues in institutional isolation. Instead, voters “vote the agenda,” an agenda which reflects not the issues of one campaign, or the “institutional responsibility” of a specific office (like the duties of governor, for example), but the larger “political information environment” (Nicholson, 2005).

For example, a voter does not generally complete a ballot by methodically considering which qualifications different offices entail, and the issues discussed in the separate electoral campaigns (Nicholson, 2005). Rather, a voter considers the match

between her own position on salient issues, and what she knows of the candidates' position (she will usually rely on partisan cues) (Nicholson, 2005). The agenda of the larger political information environment consists of the most salient issues of the time; it is *not* the equivalent of what is listed on a ballot (Nicholson, 2005).

This public opinion work has important implications for a judgment-based model: when we consider whether an institution enables citizen judgment, we should look to the agenda of the political information environment – what I call the inter-institutional agenda – *not* to the content of any one ballot. Note that this perspectival shift does not change our prior evaluation of the California insurance case. In the California case, direct legislation did introduce the issue of insurance reform to the inter-institutional agenda, and in the SOS case, it still seems likely that direct legislation was not needed to introduce the issue. Also note that the distinction between decision and judgment is critical here. Californians were making decisions that would influence many issues of governance – they were casting votes not only for SOS, but also on their new governor, their new representative in the U.S. Senate, and many state and local representatives. But the inter-institutional agenda directed citizen judgment towards the single issue of SOS. If we disregard the space of citizen judgment – as the congruence standard does – we risk missing how institutional design might enable, or hinder, citizen agency.²⁷

²⁷ We should also be skeptical of reliance on constitutional protections for minority rights. For one, the empirical claim that federal courts are countermajoritarian is widely questioned in the legal literature (for an overview, see Graber, 2008). For another, it is not clear how unelected justices' voiding of popular decisions can be legitimated in a democratic system, particularly considering their oft-reliance on indeterminate doctrine (for an overview, see Waldron, 2006). The congruence standard's need to turn to judicial elites suggests the other normative problem with the "mandate" or "institutional" model: justification can always be found by referencing the amorphous "whole people's

The space of citizen judgment

We can understand governing institutions as constructing a space in which citizens judge. The concept of space is a useful way of thinking about institutions' relation to judgment, as institutions' effects are conditional, depending both on the particular citizen, and on other elements in the citizen's immediate environment. Talking about the space of citizen judgment allows us to point to governing institutions' potential influence on citizen judgment without implying that institutions determine citizen judgment.

How do institutions construct this space? Here, I have pointed to one important way – through the creation of an inter-institutional agenda, institutions structure the *objects* of citizen judgment. With SOS, citizens' judgment was directed towards one issue of governance, despite citizens casting votes for many different electoral offices. With the California insurance initiative, citizens' judgment was directed towards an issue of governance that, without the initiative, they would not have judged. We can thus understand the enablement of citizen judgment on objects of governance as one means by which institution foster (or hinder) citizen agency.

Not only do institutions structure the *objects* of citizen judgment, institutions also effect which *considerations* (or beliefs or values) *citizens apply* in judgment. Public opinion work is again helpful, here. The public opinion literature conceives a particular mental act of judgment as an “attitude” – for example, a citizen is expressing an attitude when they say a hate-group rally should not be legally prohibited (Chong and Druckman,

interests.” The people authorize governing officials to act in their interest as a whole, and the “whole people's interest” – here, the protection of minority rights – can be called upon to override the people's expressed preferences.

2007).²⁸ Particular attitudes are a product of the mental activity of combining “object evaluations” with “salience weights” (Chong and Druckman, 2007). In the hate-group rally example, object evaluations might include the rally’s consequence on free speech, and on public safety; salience weights would be the degree to which those object evaluations influenced an individual’s attitude (Chong and Druckman, 2007; Nelson, Clawson, Oxley, 1997). For instance, an individual might have a positive evaluation of the rally’s effect on free speech, and a negative evaluation of the rally’s effect on public safety, but if it does not occur to him to consider public safety (a zero salience weight), then his attitude on the rally would be wholly determined by his free speech beliefs. The considerations determining an individual’s attitude – here, his free speech beliefs – are considered his “frame in thought” (Chong and Druckman, 2007).

The inter-institutional agenda can influence citizen judgment by affecting these frames in thought. For example, a comparative study of the 2006 elections shows that the presence of a minimum-wage initiative changed the considerations citizens applied in forming their particular judgments. The initiative increased the salience of the economy; increased support for Democratic candidates; and altered voters’ perception of the policy, with Democrats more likely to support increases in minimum-wage, and Republicans less (Smith and Tolbert, 2010). These findings are consistent with previous work on the

²⁸ The concept of “judgment” is inordinately slippery because it can reference at least three different things: (1) a faculty or a capacity, (2) a type of mental activity, or (3) a particular mental act. For example, a court judge might be said to have (the capacity of) judgment, do work that involves (the activity of) judgment, and to regularly offer (particular) judgments.

effects of ballot campaigns, as well as research on issue priming and partisan priming (see Nicholson, 2005, Chapter 2).²⁹

Problematically, public opinion work has shown that when citizens are presented with only one set of considerations – as opposed to competing considerations – most follow the considerations most recently presented to them. When citizens form a particular judgment, they appeal to those considerations that are both accessible and strong (Chong and Druckman, 2007a, 105, 111). For example, citizens are more likely to be tolerant of a hate rally if they are presented with a news story framing it as free speech issue, not a public safety issue (Nelson, Clawson, Oxley, 1997). Such framing effects can occur even when the frames are “logically equivalent” (Druckman, 2004). However, the ability of an elite-provided frame to determine an individual’s attitude is mediated if competing frames are offered concurrently (Sniderman and Theriault, 2004; Chong and Druckman, 2007b; Chong and Druckman, 2010).

These findings suggest that a narrowing of the inter-institutional agenda is not only problematic because it reduces the objects of citizen governance, but also because it reduces competition among frames (the considerations applied in judgment). A collapsed inter-institutional agenda makes it more likely that many citizens’ judgments are a function of which frame they last heard, loudest. The collapsing of the space of citizen judgment thus hinders citizen agency in two ways: it reduces the objects of governance citizens are likely to judge, and it makes the content of citizen judgment an effect of a

²⁹ In the psychological model I summarized here, priming and framing describe similar processes (Chong and Druckman, 2007a, 115).

frame's ability to dominate discourse (an ability that is independent of the truth of the frame, Chong and Druckman, 2007a, 111).

We can pick out several features of direct legislation that narrowed the space of citizen judgment in the SOS case. For one, simply that direct legislation and electoral campaigns are placed on the same ballot contributes to the narrowing of citizen space for judgment. Concurrent campaigns enable "spillover effects," and allowed candidates to explicitly link their campaigns to the initiative campaign, as Pete Wilson did with SOS, in his successful run for governor. Furthermore, institutional design allows such concurrent campaigns to be run in low-information elections: the priming and spillover effects of initiatives are greater in low-information elections, like midterms (Nicholson, 2005; Donovan, Tolbert, and Smith, 2008; Smith and Tolbert, 2010). Such single-issue domination of the inter-institutional agenda might well be impossible in a presidential election year.

Campaign finance laws are a second institutional feature that allowed for the narrowing of the space of citizen judgment. Campaign finance laws provided incentives to political strategists to use direct legislation to narrow the inter-institutional agenda. Until the recent *Citizens United* (2010) decision, direct legislation's finance laws were markedly different from election finance laws: in direct legislation, there are no limits on campaign spending, and no specific limitations on corporations or unions. Political strategists recognize that direct legislation campaigns presents a loophole in election law, and have explicitly used its relaxed financing restrictions to influence elections (Smith and Tolbert, 2004; Garret and Smith, 2005; Tolbert and Smith, 2006). Now that *Citizens United* has relaxed legal restrictions on election campaign financing, it is not clear that

direct legislation will continue to be such a significant target for “soft-money.” That said, it seems rash to assume electoral campaigns will no longer utilize direct legislation, given its past value (Nicholson, 2005).

Finally, if we combine the two above features – concurrent campaigns and campaign finance laws – with a third – party organization – we see how the institutional design provides incentives for the use of “wedge” issues. Partisans’ strategic targeting of direct legislation to influence electoral outcomes suggests that one particular set of issues are likely to dominate the inter-institutional agenda, when direct legislation produces such domination: “wedge” issues. Partisans use wedge issues to map themselves and their electoral opponents onto an issue; the issue is chosen to generate votes. Wedge issues are (by definition) chosen to reduce the inter-institutional agenda to one issue. The most effective wedge issues are “highly emotive issues” that are “widely supported, especially by voters who ordinarily would not vote”; “easily understood”; and automatically associated with one or more parties (Nicholson, 93, 2005). In American politics, race has long met all these requirements, making it the “quintessential wedge issue”; in this way, SOS, with its racial overtones (made explicit in some advertisements), was paradigmatic (Nicholson, 93, 2005). But other issues can be used as wedge issues as well – some argue LGBT rights have recently been used as wedge issues.³⁰

In sum, features of inter-institutional design – concurrent campaigns, finance laws, and party organization – provide incentives to partisans to narrow the inter-institutional agenda to one issue, likely a wedge issue. In cases like SOS, the institutional

³⁰ See Campbell and Monson (2008), Becker and Scheufele (2009), and Freedman (2004) for discussions of this debate.

design narrows the space of citizen judgment. Note that institutional context was different in the 1988 California insurance campaign. In the 1988 campaign, funding came from interest groups (insurance lobbies, attorney lobbies, and citizen consumer groups), not partisan interests (Lupia, 1994). And the anti-reform groups did not want to be associated with their ads, purposefully distancing the issue from any sort of reference groups (Lupia, 1994, 66). Partisan cues were not available (Lupia, 1994), reducing the likelihood of spillover effects. Furthermore, it was a presidential election year, making it more difficult – the literature suggests it might well be impossible – for a direct legislation issue to dominate the inter-institutional agenda (Nicholson, 2005; Donovan, Tolbert, and Smith, 2008; Smith and Tolbert, 2010). Certainly, the success of the insurance reform initiative did not produce sweeping results for Democrats – Bush narrowly won California that year.

A judgment-based model points to institutional reforms that the congruence standard has already recommended, like placing caps on contributions to direct legislation campaigns. But it also points to new institutional reforms. A judgment-based model suggests direct legislation should be divorced from electoral campaigns. Initiatives might be placed on separate ballots from electoral campaigns. Also, partisan use of wedge issues might be limited by restricting party's donations to initiative campaigns – recall that the SOS initiative would have run out of funding if the Republican party had not stepped in with its donation (Nicholson, 2005, 96). Because direct legislation is so costly, individual candidates do not typically use wedge issues, but parties do, as both the cost and benefits are spread out over a number of candidates (Nicholson, 2005, 93).

Conclusion

In this chapter, I began developing an alternative model for the evaluation of contemporary institutions of mass democratic politics. Institutions' enablement of citizen judgment should be used as a measure of democracy. Specifically, we should consider how institutions structure the space of citizen judgment, worrying when institutional design constrains that space, and looking for institutional features that create and maintain it. A narrow space reduces the objects of governance that citizens judge, and makes citizen judgment more likely to be a function of a frame's ability to dominate the communication environment.

Certainly, in cases like SOS, it is not only direct legislation that is the problem; rather, the difficulties lie in the manner which direct legislation functions in conjunction with other institutions. A full analysis of a democratic system must pay close attention to inter-institutional relations. Further work should consider how other institutions structure judgment. As successful propositions are circulated among institutions, citizens may continue to judge the issue. The continued circulation of judgment does not reduce or alter the democratic "effects" of judgments that came earlier – as I explained above, a judgment-based model understands judgment itself to be a form of political agency, so no outcome can negate its democratic "effect"³¹ – but it does suggest further subjects of study.

³¹ With the exception of the removal of that which gives judgment power – here, suffrage.

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Chapter 5

Conclusion

Institutions “structure”: by definition, an institution is a set of constraints that, by constraining, generates particular patterns of behavior, including ways of thinking. In this dissertation, I asked, how do governing institutions structure judgment? Might governing institutions contribute to the production of good judgment, and if so, how? To answer these questions, I developed a dynamic concept of judgment, relying heavily on the idea of a reflective equilibrium. I suggested that judgment is a process that occurs over time, and occurs among and between institutions and individuals. I developed a standard for evaluating this procedural notion of judgment, and called this standard good judgment. I then applied this standard to the analysis of two U.S. institutions, direct legislation and the judiciary. I noted features in both institutions that contribute to collective processes of good judgment; I also noted the limits of these institutions’ contributions. I found that the capacity of institutions to contribute to collective processes of judgment formation depended not only on an institution’s particular design, but also on an institution’s location in a larger system of institutions.

Once we understand the construction of good judgment to depend not only on the features of any one particular institution, but also on the dynamics of inter-institutional relations, the door is opened to rethinking the degree to which good judgment is a function of democratic politics. First, though, what do I mean when by “judgment as a

function of democratic politics”? I refer to a tradition that understands judgment – good or bad – to be a product of an institution’s relation to democracy, particularly mass democracy. Some understand democracy to generate good judgment. For example, Waldron (1995) argues that Aristotle offers a “doctrine of the wisdom of the multitude”: the deliberation of a heterogeneous community can produce something that is not only greater than the parts on their own, but also greater than its simple aggregate.

More commonly, it seems, is the argument that democracy is – in one way or another – antagonistic to good judgment. For example, consider Hamilton’s famous argument for judicial review in *The Federalist Papers*. Hamilton claimed the judiciary’s judgment is characterized by its “integrity and moderation”: because of this particular capacity – one which depends, it seems, on its insulation from mass democracy by its life tenure – the judiciary should be given the power to “moderate” and “check” “the occasional ill humors” of legislatures (Federalist 78, 477). There are echoes of Hamilton’s arguments in contemporary discourse, particularly those who defend judicial review and life tenure for justices, and argue against judicial elections. For example, Dworkin (1999) argues that the maintenance of the fundamental rights on which democracy depends requires the existence of a judiciary insulated from mass politics.

Or, consider the tradition that understands good judgment to be largely a function of the right conditions for discourse. For example, Canada’s new Citizens’ Assemblies – one in British Columbia, and one in Ontario – are quickly becoming models of not only democratic deliberation, but also the production of good judgment. Both were created through legislative order, and consisted of (mostly) randomly selected citizens who were

assigned to debate one issue: evaluating their province's electoral system.³² The small size of these assemblies, the random selection of their members, and debate's restriction to a single-issue, appeared to create near-ideal conditions for deliberation (Warren, 2008). Discussion was structured to focus wholly on the issue at hand, there were no constituency pressures or incentives for strategic advancement, and resources were provided to citizens in order that they might learn their not-so-straightforward subject of electoral system design (Warren, 2008). The conclusion these assemblies produced – considered and practical recommendations for electoral reform – have been properly touted as examples of the good judgment “regular” citizens can produce, given the proper conditions for discourse (Warren and Pearce, 2008). Or consider Lessig, who is trying to organize a series of constitutional conventions similar in form to the Citizens' Assemblies. Lessig hopes that once the public recognizes the “good sense” recommendations such citizen assemblies can generate, a citizen assembly will be established for rewriting the U.S. constitution (2011, 303).

This dissertation's shift away from evaluating judgment according to the output of any one particular institution – like the recommendation of a citizen assembly, or the opinion of a court – complicates the claim that quality of judgment is largely a function of an institution's expression of, or insulation from, democratic politics. That the relation between good judgment and democracy is more complex is apparent in the U.S., where

³² Both Assemblies have their own websites with basic information and histories, and links to referendum information. For British Columbia, created in 2003, see, <http://www.citizensassembly.bc.ca/public>. For Ontario, created in 2006, see <http://www.citizensassembly.gov.on.ca/en-CA/About.html>. Both were relatively small (160 citizens in BC, and 103 citizens in ON). Other provinces were considering similar changes at the time, but did not use Citizens' Assemblies (Pilon, 2010).

the system of governance disperses overlapping powers among institutions that are widely recognized as democratic (like referendums) and institutions that are not (like the judiciary). In a complex system like the U.S. (or Canada), it is hard to make the empirical claim that any one institution's decision is final; this suggests that judgment is better conceived as a process over time, rather than the outcome of any one decision. The Canadian Citizens' Assemblies example is illustrative, here. While the Assemblies did offer great insight into how an institution might be designed to generate good judgment, it is also the case that the recommendation of the Assemblies were never put into effect because their recommendations were voted down in popular referendums (Warren and Pearse, 2008).³³

This dissertation's analysis of inter-relatedness of institutions suggests, then, that good or bad judgment should not be sought in the output of any one institution. The empirical reality of U.S. inter-institutional dynamics motivates this claim, but it is worth noting that Urbinati (2006) identifies this very lack of finality as a key characteristic of democratic institutions. The lack of a final decision, she argues, enables the circulation of judgment (e.g., the right of repeal in Condorcet's proposed constitution, 214-7). And when a decision cannot be repealed – Urbinati argues this is the case with judicial decisions (2006, 127) – the processes of collective judgment cease. Following Urbinati's insight on the importance of repeal, this dissertation's analysis of the U.S. judiciary shows how those acts that commonly travel under the label of "implementation failure" – acts like, Hawaii's constitutional referendum nullifying the *Baehr* decision allowing

³³ To be clear, this is not intended as a criticism of Warren and Pearse (2008), whose collected edition on the Citizens' Assemblies also included a study of the referendum.

same-sex marriage, or the referendum rejecting the Assemblies' recommendation – might be re-conceived as moments in a larger process of collective judgment. That no one institution has the ability to make final, authoritative decisions is not the only complication of that tradition that attaches good judgment to particular institutions, and diagnosing that good judgment as a function of the institution's relation to democratic politics (particularly mass democratic politics).

As my chapter on direct legislation illustrated, it is also the case that judgment occurs in an environment informed and by multiple institutions. When citizens vote on a referendum, for instance, they do not do so in an information environment only structured by the institution of direct legislation. If referendums are concurrent with electoral campaigns – as they almost always are – such campaigns alter the so-called “information environment,” and also help structure citizens' referendum votes. Furthermore, as my analysis of direct legislation showed, it is not simply that electoral campaigns influence voting decisions: political actors are well aware of the complicated environment, and strategically employ direct legislation campaigns to gain advantages in elections.

This being the case, does it make sense to condemn the mass politics of direct legislation as the source of bad judgment (whether one uses a procedural standard such as this dissertation's, or a substantive, outcome-based standard)? My direct legislation chapter suggested that it does not. Although certain features of direct legislation might have made it culpable in the past – features such as no caps on campaign donations – the rules that governed inter-institutional relations – such as concurrent ballots – were, I argued, equally if not more responsible for problems with judgment.

Finally, in identifying features of institutional design that contributed to (or diminished) good collective judgment, this dissertation develops insights of the “constructivist turn” in democratic theory (described by Disch, 2011). The constructivist turn challenges those theories that ground good judgment in individual capacities, and suggests that judgment is always a collective process. While, as Disch (2011) explains, the collective character of this process erodes “the bedrock” of one theory of democratic representation – that which evaluates representation according to responsiveness to citizens preferences, and so requires preferences to be exogenously formed – it also suggests that democratic citizens need not be the perfect judges we know them not to be. This dissertation has shown how some of the burden for good judgment can be shifted from individuals to the design of governing institutions.

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